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A TREATISE

—ON—

AMERICAN ADVOCACY

A treatise covering succinctly the entire range of advocacy, trial tactics and legal ethics, together with the publication as an appendix hereto of the American Bar Association's Canons of Professional Ethics

—BY—

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Professor of Advocacy and Legal Ethics in the Saint Louis University Institute of Law.

SECOND EDITION

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PREFACE TO THE FIRST EDITION.

To the weary, storm-tossed mariner, seeking the safety of the harbor, nothing is so welcome, so cheering, so encouraging, as a glimpse of the rays of a friendly lighthouse or the warning sounds of the fog-horns. So, also, without stretching extravagantly the *simile*, there comes to the struggling professional man, buried in his books or overwhelmed, sometimes by the drudgery and the dry details of his practice, a sense of buoyant hope and a thrill of encouragement as his eyes for a moment catch glimpses of the high eminence of his profession and behold, on the summit, men who, like himself, have struggled, even as he is now struggling, to reach those places where they now sport themselves at will, conscious of their power and enjoying the supreme confidence of the people. To reach this eminence is the advocate's highest ambition; to assist him to do so is the highest purpose of this volume.

The profession of law sustains the most personal relation to the individual of all professional or business relations of life. The supreme characteristic of a great lawyer, therefore, is not so much an expansion of the brain as an enlargement of the heart, a wide and generous sympathy, a nervous system carefully attuned to all the passions and prejudices in life, a man that not only knows human nature, but has an appreciable quantity of human nature in him; a man, indeed, whom, when his client seeks advice, he finds not merely a cold-blooded jurist, a profound oracle of the law, but a man strong in his sympathies and full of resources for evading or escaping difficulty; resources that come not altogether from law books, but from the book of experience, which he has so diligently studied, both in his own life and the lives of others,—a man who, when he

stands before a court or jury, stands not in his own shoes, holding out his client at arm's length so as not to be contaminated by him or by his affairs, but an advocate in every sense of the term, standing in the place of his client, taking upon himself the burden of his case, and enwrapping himself so intensely in the feelings of his client that words burn on his lips as he denounces the deceiver, and tears start to his eyes as he relates the sorrows and griefs of his client under the heel of the oppressor; a man, indeed, who struggles in defense of the life, fortune and honor of his client as if it were his own. Such is the truly great lawyer, as distinguished from the jurist. The qualifications that go to make up his success cannot be learned out of the text-books of the law—they come only to the man who flirts with human nature; who experiences, as far as possible, all the passions of the heart and all the hopes, pleasures and disappointments of life; who communes with the greatest exemplars of his profession anl carefully studies their lives, methods of work and their great efforts at forensic pleading.

The ninth edition of the old English work of Mr. Richard Harris, entitled "Hints on Advocacy," which is well known to the profession and universally recognized as one of the best books of its kind published, has been taken as the foundation for the present treatise. It had two defects: First, its arrangement was not logical, nor was the matter easily accessible; second, the American reader found much in it which was useless to him, and much that was not in it of which he very much desired to be informed. To overcome these two effects and thus make the volume as near perfect as possible, we have made a thorough and systematic revision of this standard work. We have first gone through Mr. Harris' pages and cut out all useless matter and such as had reference only to the practice as it existed in England. Secondly, we have re-read the pages and subdivided all the matter into short sections with appropriate sub-headings. Thirdly, we have

taken these sections and arranged them in chapters, under significant titles. Fourthly, we have taken the chapters, as thus prepared, and arranged them in logical order.

At this point, while we had culled the best of Mr. Harris' work, we had, as a result, but a meager contribution to the subject of American Advocacy. We, therefore, proceeded, first, to compose four new and entirely original chapters on themes which had received absolutely no attention in Mr. Harris' work and very little attention in any other work on the subject of Advocacy that has come to our attention. These four new chapters are as follows: Chapter II, Office Work and Preparation for Trial; Chapter XIV, Briefs, Arguments and Methods of Speaking; Chapter XV, Legal Ethics; Chapter XVI, Ethics—Compensation and Advertising. We then took up the work, as thus completely outlined, subheaded and revised, and carefully reviewed each chapter and section, changing the language to more intelligible expressions of the rules of advocacy as applicable to American practice, composing many new and entirely original sections, interpolating where the original text seemed to demand more explanation and annotating throughout with appropriate quotations and references.

We believe that the work, as thus reconstructed and revised, will become an invaluable assistant to every lawyer, especially the young practitioner, serving to keep fresh in their minds the great principles of advocacy, upon a proper observance of which all true success at the bar so vitally depends.

St. Louis, Mo. ALEXANDER H. ROBBINS.

PREFACE TO SECOND EDITION.

In preparing for the press the second edition of this work I wish to acknowledge the very kindly reception granted to the first edition, not only by members of the profession, but by the law schools, so many of which have come to see the importance of giving more prominence to the subject of advocacy and legal ethics.

It is partly in response to the needs and wishes of law school instructors that I have added a new chapter to this work, to-wit, Chapter 1, Origin, Qualifications and Authority of the Advocate, which will be found interesting, no doubt, to lawyers as well as law students.

In order, moreover, that the field of legal ethics might be fully covered, I have added as an appendix to this edition the American Bar Association's Canons of Professional Ethics. Practically all boards of law examiners require an examination more or less thorough on the provisions of the code of ethics so that no course of instruction can be said to thoroughly prepare the law student for his license examination that does not familiarize him with the principles underlying the code of ethics and with the specific provisions of the official Canons of Professional Ethics now reorganized and enforced by the courts and by bar associations in nearly every state in the Union.

Corrections and additions have been made in many places which, we trust, will serve to make this edition even more thorough and comprehensive than the first edition; and it is the hope of the author that the work as now given to the press will prove as interesting and valuable to the older practioner as to the law student.

St. Louis, Mo. ALEXANDER H. ROBBINS.

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AMERICAN ADVOCACY

CHAPTER I.

ORIGIN, QUALIFICATIONS AND AUTHORITY OF THE ADVOCATE.

§ 1. Ancient Origin of Advocacy.
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5. Distinction Between the Duties of Barrister and Solicitor.
6. The Lawyer and Advocate in America.
7. Who May Practice Law in America — General Rules.
§ 8. Who may Practice Law in America—Women.
9. Who May Practice Law in America—Corporations.
10. Who May Practice Law in America — Trust Companies.
11. Qualifications of an American Lawyer—Citizenship and Residence.
12. Qualifications of an American Lawyer—Good Moral Character.
13. Qualifications of an American Lawyer—Intellectual Requirements of Admission.

§ 1. **Ancient Origin of Advocacy.**—An advocate is primarily one who speaks for another. In this sense, advocacy is one of the oldest institutions in human

history. From the time that Moses became the advocate of the oppressed Israelites before the Court of the Pharaohs of Egypt to the present time, the principle has always been recognized that one could choose another to speak or plead for him.

Advocacy has always been a most honorable calling. St. John speaks of the risen Christ as an Advocate. "We have an advocate with the Father," says John, "Jesus Christ, the Righteous."

The great orators of Greece and Rome discharged the duties of advocates with imperishable honor to themselves and often with much success to their clients.

In ancient Greece, while the advocate did not flourish professionally with as much liberty and success as he did in Rome, he nevertheless exerted hardly any the less influence on the course of justice in Grecian tribunals. While relatives and friends were sometimes permitted to speak for a litigant in court, the usual practice was for the great orators or writers of Greece to hear the client's complaint and then compose for him an oration which the litigant himself read in open court.[1]

In the era of the Roman Republic it was considered not only the duty but the high privilege of the patrician

[1] "Before the tribunals of Athens, although the party pleaded his own cause, it was usual to have the oration prepared by one of an order of men devoted to this business, and to compensate him liberally for his skill and learning. Many of the orations of Isocrates, which have been handed down to us, are but private pleadings of this character. He is said to have received one fee of twenty talents, about eighteen thousand dollars of our money, for a speech that he wrote for Nicocles, King of Cyprus. Still, from all that appears, the compensation thus received was honorary or gratuitous merely." Sharswood's Professional Ethics, p. 137.

to assist and protect his dependents and perhaps others who sought his assistance, and for that purpose he often entered the tribunals of justice to plead their cause. Thus arose the highest order of Roman advocate, the *patronus causorum* or patron. No fees were charged for such services although sometimes a gratuity or *honorarium* would be accepted by the patron as a gift. The patron was held in very high esteem but the professional *advocatus* was considered at that time an abomination. Statutes were passed, prominent among which was the Cincian Law, which prohibited the advocate to charge or receive any fee for his services.

Later, in the era of the Roman Empire, the Cincian law was ignored and the professional *advocatus* received public recognition and his qualifications, duties and manner of compensating him for his services, were regulated by statute. Professional advocacy then rose to an honorable calling and gradually supplanted the ancient and more distinctly honorable relation of patron and client. Into all countries, therefore, where the civil law has gone, the *advocatus* has followed and he is still called by that name or some derivative therefrom.

We should not fail to refer in this connection to the Roman *juris consult* who was the confidential legal adviser of the Roman people. He frequented the Roman Forum being given the privilege of "practicing" there by a public introduction. His knowledge of the law was superior to that of the patron and advocate and his advice was eagerly sought by both judge and litigant.[1]

1 "On the public days of market, or assembly, the masters of the art were seen walking in the forum, ready to impart the needful

§ 2. **The Rise of Advocacy in England.**—Very early in the history of England, justice was crudely and arbitrarily administered. The village moots, the shire courts and, in feudal times, the barons' courts, administered justice without much formality. A lawyer was not a necessity. But an advocate, one who could speak for the accused, was not unknown. This duty was usually performed by priest or monk whose education fitted him for this service. Later, laymen, especially among the nobility, trained themselves for this service, until under the reign of Henry III we find a strong tendency to limit this duty to specially trained laymen, who were in that reign organized into what were called the Inns of Court, which were given exclusive power to extend a call to the bar and provide the qualifications therefor. The study of law, also, at least for purposes of practice, was prohibited in any other place.

There are four common law Inns, to-wit: Lincoln's Inn, the Inner Temple, the Middle Temple, and Gray's Inn. They are, and have always been, the leading law schools of the empire. A student enters one of these Inns and tarries until he receives his degree and is "called" to the bar. The barristers usually have their chambers in or near these Inns and give of their time and learning in lecturing to the students. There are also eight Chancery Inns, which are exclusively schools

advice to the meanest of their fellow citizens, from whose votes on a future occasion, they might solicit a grateful return. As their years and honors increased, they seated themselves at home, on a chair or throne, to expect with patient gravity the visits of their clients, who at the dawn of day, from the town and country, began to thunder at their doors." Gibbon's Decline and Fall of The Roman Empire, c. xxiv.

of law as no call to the bar is extended to any but students of the Inns of court.[1]

§ 3. **Calling the English Barrister to the Bar.**— Upon completing his three year course of studies and taking his final examination under exclusive supervision of the "benchers" of the Inns of Court, the student receives his "call" to the bar. He then becomes a junior counsel and practices for the first ten years, at least, "without" the bar. He is therefore called an "outer" or "utter" barrister. Inside the bar sit the King's counsel. They are appointed by the King, or rather by the King's legal adviser and representative, the Lord Chancelor. They are distinguished from the junior counsel by the fact that they alone have the privilege of practicing "within" the bar and are further distinguished by the silk gown and full bottom wig. They are selected from among the junior barristers of ten years' practice, in front of whom they sit in court and for whom they usually act as "leaders" in any case in which both may be engaged. No pecuniary advantage attaches to a King's counsel except the right to larger fees. He also has precedence in speaking and in gaining the ear of the court.

The term, "sergeants at law," was given to the earliest known licensed practitioners of law in England. Their rights and prerogatives were very similar to those of the King's Counsel with whom they have gradually merged and the term itself has sunk into desuetude.[2]

[1] For a full account of the origin of the Inns of Court and of early English practice, see 1 Blackstone's Com. 23, et seq. See, also, Reeves' History of English Law.

[2] "The first persons regularly licensed to appear as advocates in

§ 4. **Admission of the English Solicitor as an Attorney at Law and Solicitor in Equity.**—In England the barrister is purely an advocate and adviser. All other duties usually appertaining in this country, to an attorney-at-law are in England performed by the solicitor. Owing to the great jealousy existing between these two great divisions of the same profession there is very little communication between them. Therefore one cannot pass from one branch of the profession to the other except with great difficulty.[1] The prerogatives of the solicitor are not so ancient nor so honorable as those of the barrister and for this reason the latter regards himself as belonging to a higher order of professional aristocracy and seeks to retain his ancient privileges and honors intact. Nevertheless, solicitors have by the efforts of their great and powerful organization, known as the "In-

the King's courts were called 'sergeants' although their full official title seems to have been *Servientes Domini Regis ad legum;* that is, *Servants at law of our lord, the king.*" Unlike all prior advocates they were a part of the court itself; were regularly appointed by royal patent; were admitted only upon taking an oath; had a monopoly of all practice, and were directly amenable to the king as parts of his judicial system. The fundamental ideas involved in the creation of this class has never been abandoned, and, notwithstanding that the class itself by the name, "sergeants" has ceased to exist, they are still the distinguishing characteristics of the bar in all countries where the common law prevails. Warvelle's Essays in Legal Ethics, p. 29.

[1] A solicitor wishing to be a barrister must voluntarily get himself struck off the rolls as a solicitor and enter as a student one of the Inns of Court. And a barrister wishing to be a solicitor must first of all be disbarred voluntarily and then be articled as a clerk for at least three years to a practicing solicitor. Where either a barrister or a solicitor has been in practice for five years, the period of apprenticeship and study in either case is very materially reduced.

corporated Law Society of the United Kingdom" materially raised the standard of their own profession.

The solicitor while not a member of the bar is an officer of the court.[1] His education is greater than that of the barrister in that it is more varied. He must know more than the mere theory of the law and its procedure. He must understand its application to business and human affairs. He is the closest advisor and most confidential counsel in the world. The entire organization of business in England, the settlement of estates for widows and orphans, conveyancing, bankruptcy, divorce and separation, family difficulties and the public sale of real and personal property are under his exclusive supervision.

The education of the student desiring to become a solicitor is regulated by the Incorporated Law Society who maintain schools for that purpose and provide for the final examinations. To entitle a person to become a solicitor, he must, by contract in writing, be "articled" as a clerk to some practicing solicitor for a period of five years.[2] At the end of his term he

[1] While members of the bar are solely amenable to the "benchers" of their respective Inns, solicitors, who are officers of the court, are subject to the control of the judges. The examination of students and their admission are moreover regulated by statute, and no person is permitted to act as a solicitor who is not admitted and otherwise qualified according to the provisions of the Solicitor's Acts.

[2] Graduates of any university in England need serve as clerks for a period of three years only. Moreover the judges of the Supreme Court may sometimes in their discretion reduce the term of clerkship. Before a person can be articled, however, he must pass a preliminary examination to show the extent of his general learn-

takes the final examination provided for by the society and is then ready to present himself to the court for admission as a Solicitor of the Supreme Court.[1]

§ 5. **Distinction Between the Duties of Barrister and Solicitor.**—Why there should be the distinction that exists between barrister and solicitor in England and wherein the necessity exists for such a hard and fast line of separation are conundrums to the American lawyer and, we might add, to the English lawyer as well.

The first distinction, aside from the peculiar costumes of the barrister and his station of vantage in the court room, between the solicitor and barrister is as to the character of their respective clients. "While all the world might if he could get it, be the client of a solicitor," says Mr. T. W. Tempany, of London, Eng., "a barrister's clients are only solicitors; the former being prohibited from taking cases or work from the general public without the intervention of a solicitor, and as a fact it is but rarely that a barrister sees the actual client."

Again, barristers cannot enter into partnership between themselves or with solicitors while the latter may form partnerships at will.

ing in rhetoric, grammar, arithmetic, geography, Latin, English history, and any two of the following languages: Greek, French, German, Spanish and Italian.

[1] Previous to the Judicature Act of 1873, it was customary for a solicitor to be admitted in both the Court of Chancery and the Court of King's Bench; in the former court before the Master of the Rolls as a solicitor in equity, and in the latter before the Lord Chief Justice of England, as an attorney at law. This act, however, has abolished the title of attorney-at-law and the one general title of "Solicitor of the Supreme Court" is applied to all practitioners, the one admission before the Master of the Rolls being alone sufficient.

The barrister is an advocate purely and simply although he may advise in his chambers. He is therefore an expert in the theory of the law and in his understanding of the technicalities of pleading and of the rules regulating the introduction of evidence. He alone, also, has the ear of the court, a solicitor being absolutely denied the right of an audience except in chambers.

The solicitor hears the client's complaint, prepares his evidence, interviews his witnesses, determines the remedy and prepares his brief. The barrister may or may not be asked to prepare the pleadings although in difficult cases his advice is sought by the solicitor. The latter, however, attends upon hearings in chambers of all interlocutory proceedings and the barrister handles the case only when it is ready for trial. Here he displays his special ability as an advocate, as an examiner of witnesses, as one having ability to expose perjury and to influence favorably the minds of the court and jury.

§ 6. **The Lawyer and Advocate in America.**—In America, although some have thought to make a distinction between an attorney at law and solicitor in equity there is in fact no distinction between these terms; and the one term, attorney-at-law, covers the whole range of professional activity. None of the ancient rights, privileges and prerogatives of the English barrister obtain in this country. Indeed, it may be accurately stated that the American lawyer is rather the English solicitor possessing, however, all the professional rights and duties of the English barrister, but without his peculiar privileges and social rank. While the position of the American lawyer is an honorable one it entitles him to no social prestige.

On the other hand, the fact that he is an advocate as well as a solicitor makes him amenable to most of the ethical rules that control the conduct of the English barrister. Many of the controversies, therefore, between lawyers in this country on questions of ethics arise from the failure to take into consideration this two-fold character of the American lawyer. However, while the ethical and social position of the American lawyer will probably never reach that of the English barrister the tendency is to raise the standard higher than that of the solicitor and to approximate as near as may be, the ethical ideals of the English advocate.

Mr. Weeks, in his work on Attorneys-at-Law, says: "In the United States, there is no distinction between barristers and attorneys. Every lawyer, or 'counsel' is permitted to take every kind of business; he may generally argue a case in the highest courts, or write letters to delinquent debtors, he may himself conduct all the proceedings in a cause, confer with the client, issue the writ, draw the declaration, get together the evidence and manage the trial when it comes on in court." He might have added also that the American lawyer may and often does invest money for clients, investigate titles, write insurance, draw mortgages, wills, leases and other conveyances, sell real estate, collect rents and in doing all of these things he is not departing, in the least, from the duties of a solicitor under the English practice.

We make no doubt that the profession of the lawyer in America with only a slightly lower standard than that of the English barrister and a somewhat higher position than that of the English solicitor, is far preferable to both lawyers and clients than the English system. The young junior barrister will starve more

quickly and with greater agony than the young legal fledgeling in America, for the single reason that the former cannot reach the client by any of the innocent subterfuges used by an American lawyer. He cannot reach the client at all; he must wait until he can secure the backing of some solicitor, although conscious of his power and ability to handle a case in court. No special privileges granted to King's Counsel in England give to the older American lawyer any power to keep the younger practitioner from proving his ability and it not infrequently happens that lawyers are at the bar less than ten years in this country who have succeeded in far outstripping those older in practice simply by reason of their superior ability as advocates. There is a free fair chance at the American bar for every licentiate and no "mute, inglorious" Erskine ever blooms or blushes unseen and, what is still more to the point, unretained.

There is no question, however, but that the American lawyer's highest ideal is the great advocate. Advocacy is still regarded, and properly so, as the highest pinnacle of professional attainment. A lawyer, for instance, may succeed financially as a corporation advisor, or as a real estate expert, or as a great jurist or law writer and teacher, but he is never regarded as a great lawyer until he has proven himself to be also a great advocate. Evarts, Choate and O'Conor are names that stand preeminently at the head of the American bar and they stand there as great advocates, as those who not only knew the law but knew also how to secure for their clients the application of the remedies which it offers for the infringement or impairment of rights to life, liberty or property.

§ 7. **Who May Practice Law in America—General Rules.**—The right to appear as an advocate in a court

of law in America is a privilege and not a constitutional right,[1] and is to be distinguished from the right of a party plaintiff or defendant to appear *pro se* subject to no restriction on his right to so appear. An advocate appears in court not for himself, but for another and this right is a franchise and purely statutory.[2] In some states the constitutions prescribe the qualifications of attorneys, in others, these qualifications are prescribed by the legislature, but in all cases the appointment is made by the court. The admission or the disbarment of an attorney, therefore, is a judicial proceeding and not a mere ministerial act.[3]

[1] The right to practice law is not "property" nor a "contract" within the constitutional meaning of those terms. Cohen v. Wright, 22 Cal. 307. After receiving his license, however. an attorney's right is "something more than a mere indulgence revocable at the pleasure of the court or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency." Justice Field in Ex parte Garland, 4 Wall. (U. S.) 333.

[2] In re Cooper, 22 N. Y. 67; Cohen v. Wright, 22 Cal. 293. In the case of In re Cooper, supra, Judge Selden said: "Barristers or counselors at law, in England, were never appointed by the courts at Westminster, but were called to the bar by the Inns of Court, which were voluntary unincorporated associations. The power of the court to appoint attorneys as a class of public officers was conferred originally, and has been from time to time regulated and controlled in England, by statute. (4 Hen. IV. ch. 18; 3 James I, ch. 7; 6 and 7 Vict. ch. 73, § 2082, Vict., ch. 77, §§ 40-45.) * * * It is plain, therefore, that although the appointment of attorneys has usually been entrusted in this state to the courts, it has been nevertheless, both here and in England, uniformly treated, not as a necessary or inherent part of their judicial power, but as wholly subject to legislative action. I take no notice of the distinction between attorneys and counsel, because the same principles in respect to the modes of appointment are of course applicable to both."

[3] Ex parte Garland, 4 Wall. 378.

The "office" to which an attorney is thus appointed, however, is not an office in the sense of a public trust for the transaction of public business but is a special license or franchise to exercise certain privileges which otherwise the grantee would not be permitted to exercise.[1] The advocate, is, therefore, an officer *sui generis* of the court and subject to the rules imposed by the court in regulation of the practice therein.[2]

In the absence of constitutional inhibitions the legislature usually prescribes the general rules regulating the admission of attorneys while to the courts is usually committed the duty to examine and admit the applicant to practice. The most approved method of admission is on examination by the supreme court, or by examiners appointed by them and upon proper recommendations as to the moral character of the applicant. Upon passing his examination before the court he must, before exercising the right to practice as an attorney take the prescribed oath which is usually to the effect that he will support the constitution of the state and of the United States and faithfully discharge the duties of an attorney. Upon taking the

[1] Matter of Burchard, 27 Hun. (N. Y.) 429; Ex parte Garland, 4 Wall. (U. S.) 333. Thus where an attorney practices his profession and serves as county judge he is not holding two offices in violation of the constitution. Bland County Judge Case, 33 Gratt. (Va.) 443.

[2] Being court officers and not public officers attorneys cannot be compelled to submit to the taking of "test oaths" provided for public officers. Matter of Attorneys Oath, 20 Johns. (N. Y.) 492 (anti-duelling oath); Ingersoll v. Howard, 1 Heisk. (Tenn.) 247 (anti-Ku Klux Klan oath); Ex parte Garland, 4 Wall. (U. S.) 333 (anti-Rebellion oath).

oath and signing the roll of attorneys he is given his license to engage in the active practice of the law.

§ 8. **Who May Practice Law in America—Women.** —The hostility of the common law against what are now known as "women's rights" is probably responsible for the fact that a woman was not eligible to be admitted as a barrister or as a solicitor.[1] Nor does the federal constitution offer any relief against such discrimination[2] Aside from prejudice arising from the ancient customs of the Anglo-Saxon race and from the peculiar attitude of the race, especially toward married women for more than ten centuries, the real underlying and fundamental objection to women as lawyers has been her total incapacity, after marriage, to perform many of the functions of a person *sui juris*. And this reason is boldly stated in many of the cases which support the rule of woman's ineligibility. While this reason would seem to be undoubtedly sufficient to exclude a married woman from the practice of law it does not appear sufficient to justify the exclusion of unmarried women, nor even of married women where the disabilities of coverture have been wholly removed. But stranger still appears the very forced construction that is given by the courts to such words as "person" and "citizen" as not including "women" within the meaning of statutory or constitutional provisions making every "citizen" or "person" of prescribed

[1] 3 Blackstone Com. 362; Robinson's Case, 131 Mass. 376, 41 Am. Rep. 241. The right to practice law was at common law and under many state statutes confined to adult "male" citizens of the requisite qualifications.

[2] In re Belva Lockwood, 154 U. S. 116; Bradwell v. Illinois, 16 Wall. (U. S.) 130.

qualifications eligible to practice law.[1] In Connecticut,[2] the court, while recognizing the weight of authority, reached the apparently unassailable conclusion that the term "person" seemed to be broad enough to include "women." Many states now, either by statute or decision of the courts, have admitted women to practice law.[3]

While women are rapidly coming into full rights with men as citizens it does not follow necessarily that every new enfranchisement is a decided advantage, and especially is this true of the practice of the law. While as office lawyers and solicitors women have been largely successful, yet as advocates they have yet to show any marked ability or success. Her peculiar temperament probably fits a woman for the duty of gathering evidence and preparing the details of a case. Her intuition will suggest means of securing witnesses and overcoming difficulties. But the clash of wit and the incidents of intense provocation arising in the actual trial of a cause are usually too severe for the sensitively nervous organism of a woman. So while woman's success in almost every other line of endeav-

[1] Robinson's Case. 131 Mass. 376; In re Goodell, 39 Wis. 232; State v. Davidson, 92 Tenn. 531. But see contra: In re Hall, 50 Conn. 131; In re Leach, 134 Ind. 665; In re Ricker, (N. H. 1890) 29 Atl. Rep. 559.

[2] In re Hall, 50 Conn. 131, 47 Am. Rep. 625. When this decision was rendered it stood alone but its reasoning was so convincing that other courts quickly followed its conclusions. See preceding note for citations.

[3] Consult constitution and statutes of the particular state. In re Thomas, 16 Colo. 441; In re Hall, 50 Conn. 131; In re Leach, 134 Ind. 665; In re Kast's Case, 14 Pa. Co. Ct. Rep. 432; In re Ricker, (N. H. 1890) 29 Atl. Rep. 559; Goodell's Application, 48 Wis. 693.

or, including the profession of medicine, has hitherto been quite notable, her lack of success as an advocate stands out in vivid contrast as one very important exception. Probably the future has for us some great woman advocate who will yet tread, triumphantly, the halls of justice and at whose remarkable self-control, clear logic and convincing words courts and juries will be won and the rights of clients vindicated; but that time has not yet arrived and until some such brilliant example appear upon the horizon we are not justified in holding out much hope for success to the young woman starting out with the ambition to be a great advocate.

§ 9. **Who May Practice Law in America—Corporations.**—If there be any profession which is strictly, absolutely and exclusively personal that profession is the law. How then can such purely personal activities be incorporated? A lawyer cannot delegate his duties to some one else and yet a corporation must necessarily do so.

The tendency to "incorporate" the legal profession is of only recent origin and is only one of the many unhealthy symptoms of unreasonable exploitation of the corporate idea. This tendency has met with such a strong resistance in the profession that it is not likely to gain even a foothold.

The incorporated law office is simply a cloak for unethical practices. It permits laymen to practice law, to reap the emoluments and rewards belonging only to those specially qualified and licensed by the state. It is well settled that a layman cannot practice law; neither can he make an enforceable contract with a member of the bar for a division of fees for business

he may be able to direct to him.[1] How then can the corporation, an entity that does not have even the advantage of personality assume to do that which even a citizen with his greater natural and constitutional rights cannot do?

The courts of New York have taken a most resolute stand against the encroachment of corporations into fields of professional activity.[2] And so far as the profession of law is concerned the New York Court of Appeals have in the celebrated case of In the Matter of the Co-operative Law Company,[3] clearly and effectively barred the way to further corporate encroachments by bluntly enunciating the clear and unambiguous rule that no corporation could practice law or indirectly reap the rewards of the labors of an advocate. The court said in part: "The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practice law is in the nature of a franchise from the state conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. It is attested by a certificate of the Supreme Court, and is protected by registration. No one can practice law unless he has taken an oath of office and has become an officer of the

[1] Alpero v. Hunt, 86 Cal. 78, 24 Pac. Rep. 846, 21 Am. St. Rep. 17, 19 L. R. A. 483; Langdon v. Conlin (Neb.) 93 N. W. Rep. 388.

[2] People v. Woodbury Institute, 192 N. Y. 454.

[3] 198 N. Y. 479, 92 N. E. 15. See, also, In re Associated Lawyers Co., 119 N. Y. S. 77.

court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate."

The court then goes on to reason that the relation of attorney and client involves trust and confidence, and that "it cannot be delegated without consent, and cannot exist between an attorney employed by a corporation to practice law for it and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only. His master would not be the client, but the corporation, conducted, it may be, wholly by laymen, organized simply to make money and not to aid in the administration of justice, which is the highest function of an attorney and counsellor at law."

§ 10. **Who May Practice Law in America—Trust Companies.**—It might be well to call attention at this time to the fact that corporations known as "trust companies," have, in the larger cities at least, largely

taken the place of the English solicitor in matters of conveyancing, and, to that extent have made it harder for the young practitioner to gain a foothold. But, so far as such companies perform merely the ministerial duties of a solicitor they are probably more attractive to the general public than the ordinary lawyer by reason of the larger security which they offer against fraud and mismanagement. But when these huge corporations attempt to infringe upon the lawyer's prerogatives as an advocate, they are violating holy ground with unhallowed feet. A soul-less corporation, an indefinable entity, an impersonal, unresponsive, unreality incapable of taking the advocate's oath of office and unamenable to personal correction or professional ostracism for the violation of its duties is a total impossibility as an advocate. Within their proper sphere as trustees and conveyancers and investigators of titles, they should prove a public advantage, but beyond that any usurpation of the power of the advocate or any subterfuge by which they expect to reap a profit from the litigation of causes in courts of law should and will be sternly discountenanced by both bench and bar, as being derogatory of the dignity of courts and as endangering the proper administration of justice.

A recent statute in New York provides, that no corporation "shall be organized or created for the purpose of conducting any branch of the practice of law or of retaining or employing an attorney or attorneys to furnish legal advice, draw legal papers, or perform legal services of any kind or description, either directly for the person, persons or corporation for whose use such services are rendered or for the corporation retaining such attorney in compliance

with any contract of employment of the corporation or of the attorney made by the corporation with any other person, persons or corporation." This New York statute has been effective in checking the highly improper tendencies of certain great corporations, who had been given to advertising legal services so gratuitously and in a very unethical manner. It has always appeared as an unfathomable problem to the writer how reputable attorneys could sell their services to a corporation for a salary and not become besmirched by the unethical methods of the corporation in soliciting business. If a corporation can advertise their superior or professional skill in the drawing of wills, etc., why may not the lawyers whom they employ to draw these wills do so? And, if so, why may not other lawyers share this privilege?

There is no doubt but that trust companies, title guarantee companies and other corporations, doing a similar business are of great assistance in their proper sphere of activity to the lawyer and there is no reason why they should not exist in the same community with mutual profit to each other and to the advantage of the community. And this is the attitude taken by many such corporations which have scrupulously avoided encroaching upon a field which belongs exclusively to the licensed practitioner of law and which they cannot enter except at the expense of degrading the profession of the law and impeding the free course of judicial action.

§ 11. **Qualifications of an American Lawyer—Citizenship and Residence.**—In an important decision by the New York Court of Appeals it is said: "There can be no doubt that citizenship is among the 'other qualifications' required of those who apply for an ex-

amination to be admitted as attorneys, and it follows that one who seeks admission upon the ground that he has practiced for three years in the courts of another country must show that he is a citizen of this country at the time of making his application."[1] This would seem to be an undebatable proposition. For no one could become an officer of an American court of justice and take an oath to support the American constitution who at the same time professes to owe allegiance to some other sovereignty. Such a divided allegiance is an impossibility and could not be tolerated in one exercising the great powers and enjoying the special privileges of an American attorney at law.

Whether attorneys licensed to practice in one state may practice outside of the state of their residence depends upon the further inquiry whether the nonresident attorney wishes merely to appear in certain causes or to obtain a general license. Comity permits the former but not the latter. Chief Justice Ryan of Wisconsin,[2] states the distinction to be observed herein so clearly that we quote his observations:

"The general practice of courts of record in the several states, is to permit gentlemen of the bar in other states to appear as counsel on the trial or argument of causes. No license to practice is necessary for that purpose; the usual practice being to grant leave *ex gratia,* for the occasion. But general license

[1] Matter of O'Neill, 90 N. Y. 587. On this ground a Chinaman with naturalization papers (such papers being void) was refused license as an attorney. In re Hong Yen Chang, 84 Cal. 163. See, also, Matter of Yamashita, 30 Wash. 234, 94 Am. St. Rep. 860.

[2] In the Matter of Mosness, 39 Wis. 509, 20 Am. Rep. 55.

to practice as attorney and counselor rests upon quite different considerations. . . . The office of attorney and counselor of the courts is one of great official trust and responsibility in the administration of justice; one liable to great abuse; and has always been exercised, in all courts proceeding according to the course of the common law, subject to the strict oversight and summary power of the court. It would be an anomaly, dangerous to the safe administration of justice, that the office should be filled by persons residing beyond the jurisdiction of the courts, and practically not subject to its authority. Our courts cannot have a nonresident bar.'"[1]

Some courts have doubted the wisdom of being too liberal in indulging the right of nonresident attorneys to practice law because of the embarrassments likely to follow, as for instance where the applicant is a woman,[2] or where the non-resident attorney takes advantage of the court's indulgence and makes it difficult for resident attorneys to serve the usual notices upon him.[3]. It is well for the non-resident attorney to

[1] See also to same effect: Manning v. Railroad Co., 122 N. Car. 824; Matter of Henry, 40 N. Y. 560; In re Admission to the Bar, 61 Neb. 58.

[2] In re Leonard, 12 Oreg. 93, 53 Am. Rep. 323.

[3] Chappell v. Real Estate Co., 89 Md. 260. The court said: "If a nonresident attorney appear alone, and there is any difficulty in serving pleadings, etc., in accordance with our practice he should be required to make some arrangements, either with a resident attorney or in some way, by which they could be served on him without causing any unnecessary delay or trouble. If an attorney who is still a resident remains out of the state indefinitely to avoid the process of the court, he cannot occupy any better position than a non-resident attorney would. So, whether he was resident or a non-resident, if his absence in any way obstructed the progress of

remember that at the best his right to appear in a foreign jurisdiction is purely an indulgence on the part of the local courts which can be withdrawn at any time at the pleasure of the court. For reasons already indicated therefore it is generally conceded that the better practice is for non-resident attorneys to secure local counsel to appear with them and to represent them in their absence in all proceedings necessary to be taken in the cause.

In many states by statute or decision non-resident attorneys wishing to change their residence may be admitted to practice in the courts of the state into which they have located without examination and upon presentation of certificate showing authority to practice in the courts of the state of their former residence.[1]

§ 12. **Qualifications of an American Lawyer—Good Moral Character.**—Under Statute 4 Henry IV, Chap-

the case, the court would have been perfectly justified in requiring the defendant to be represented by a resident attorney who was within the jurisdiction of the court, and upon her refusal to do so to strike out the appearance of Mr. Chappell and treat her as without counsel." See also: Faughman v. Elizabeth, 58 N. J. L. 309.

[1] Consult the statutes governing the admission of attorneys. Statutes providing for special admission of nonresidents are not so liberally construed by the courts in the later cases as under the old practice, the reason being that when a state begins to raise its standard of admission to the bar it is jealous of any opportunity that may be given to evade these qualifications by the applicant coming in, through the door of comity, from another state. In such case he must prove in addition to his license that he has the necessary qualifications. In re Application for Admission to Practice, 14 S. Dak. 429. See also In re Crum, 72 Minn. 401. Such a rule does not require the court to admit nonresident attorneys, such as women, who could not have been admitted originally in the state of their adoption. In re Leonard, 12 Oreg. 93, 53 Am. Rep. 323; In re Maddox, 93 Md. 727.

ter 18, it was provided that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty. Subsequent statutes in England and America have emphasized the requirement of good moral character as a pre-requisite to the right to enter or continue in the practice of law. And this is true irrespective of statute since the court by granting a license to practice law impliedly holds out to the public that the applicant is fairly competent to take charge of the important personal and financial interests of litigants that may be committed to his care and supervision.

Considering the very intimate relation and position of trust which an attorney occupies toward his client it would indeed be a great misfortune to the public if courts having the power to admit attorneys to practice should become careless or even too indulgent in failing to require the strictest proof of the applicant's good moral character. For surely the applicant's ability to deal honestly with the court and his client is more important than his ability to pass a creditable examination in the general principles of law since the latter defect may by diligence be repaired while the former is usually an inherent defect of character that is apt to break forth at any time to the misfortune of confiding clients and to the discredit of the profession. For this reason, therefore, an applicant may be refused a license, or, having been licensed, may have his privileges revoked on proof that he has been guilty of such moral delinquency which in the judgment of the court would unfit him for transacting the duties of so delicate and confidential relation as that of attorney to client.[1]

[1] On Application for Attorney's License, 21 N. J. L. 345; People

Referring to the question whether an attorney may by his misconduct forfeit his right to practice after license granted we are not unmindful of the language of the Court of Appeals of New York,[1] that "an attorney's professional life is full of adversaries; always in front of him is an antagonist sometimes angry and occasionally bitter and venemous;" and that between a defeated antagonist on the one hand or a disappointed client on the other his actions are frequently subject to misconstruction. But, on the other hand, we feel constrained to agree with the language of the Supreme Court of Wisconsin,[2] in its very wise observation that "there is a spirit of fairness and magnanimity among members of the bar, not surpassed in any other profession" and that "experience and observation warrant the assertion that no respectable

v. Smith, 200 Ill. 442; State v. McClaugherty, 33 W. Va. 250; In re O—, 73 Wis. 603; In re Percy, 36 N. Y. 651; Ex parte Walls, 73 Ind. 95. "The power of the court to reject the application on the ground of moral delinquency, is clear and unquestionable. The power, it is admitted, is one of great delicacy, and should be exercised with extreme caution, and with a scrupulous regard for the character and rights of the applicant. But on the other hand, the standing of the profession must not be disregarded, nor must the court shrink from the performance of a clear duty, however embarrassing." In re Application for Attorney's License, supra. Thus, where an attorney had been convicted of a felony and then pardoned, his good moral character is not restored by the pardon and his name may for that reason be stricken from the rolls. People v. George, 186 Ill. 122. Moral delinquency for which he might be indicted will deprive an attorney of the right to practice whether he has been indicted or not or even if indicted and the proceedings have been quashed on technical grounds. State v. Winton, 11 Oreg. 456.

[1] In re Eldridge, 82 N. Y. 167.

[2] In re O—, 73 Wis. 602, 618.

bar, as a body, would tolerate the persecution of one of its members."

Bearing in mind the considerations mentioned in the preceding paragraph it becomes the duty of every member of the bar to report to the proper committee of his local or state bar association every serious dereliction from professional duties on the part of any member of the bar. It is then the duty of every grievance committee of every bar association not to attempt to "hush up" such charges without investigation, but to give to them the closest attention and the most careful consideration and, if in their judgment they believe the charges to be true and the attorney by reason of such misconduct unfit to continue a member of an honorable profession, they should without hesitation bring the proper proceedings to have the delinquent attorney suspended or disbarred from practice. And the more prominently he stands in the profession the more readily should this duty be undertaken.

§ 13. **Qualifications of an American Lawyer—Intellectual Requirements of Admission.**—With the exception of the well-known "constitutional" lawyer of Indiana,[1] most states require more than good moral character and the necessary citizenship as a pre-requisite to entering upon the practice of the law. He must also have acquired in most states a thorough knowledge of legal principles and in not a few states he

[1] By the Constitution of Indiana, Art. 7, Sec. 21, every voter of the state of good moral character shall be entitled to practice. This peculiar constitutional provision prevents the courts or the legislature from requiring any intellectual qualification of any kind, and opens the door to incompetency. The profession in Indiana have made earnest and praiseworthy efforts to correct this unfortunate situation but the great difficulty of amending the Indiana Constitution has interposed an hitherto insuperable obstacle to their efforts.

must also have provided himself with a good academic education as a proper foundation for the practice of a profession which makes such heavy demands on the intellectual resources of those who practice it.

The tendency to raise the standard of intellectual qualification on the part of a candidate for admission to the bar had its beginning within the profession itself. Finally public opinion has come to see that the higher the standard, the better the lawyer, and has crystalized this tendency into legislation. Good lawyers, like good doctors, are a blessing to any community, while poorly-equipped practitioners in either profession, though ever so sincere and honest, are a public menace.

In 1897, the Committee on Legal Education of the American Bar Association, adopted, among others, four important general recommendations, now generally accepted as the highest present obtainable standard by which to properly test the intellectual fitness of candidates for admission to the bar. First, that every candidate "should have received at least the equivalent of a high school education."[1] Second, that

[1] *Academic Educational Requirements* have now become very general, the most usual requirement being that the candidate for admission shall have had the benefit of a full three or four years' high school course of academic instruction or its equivalent before beginning the study of law. This is now the requirement in nineteen states, to-wit: Colorado, Connecticut, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Vermont, Washington, West Virginia and Wisconsin.

In a few states, more than a high school education is required, to-wit, in Delaware applicant must have diploma of college conferring degree of Bachelor of Arts or Bachelor of Science; in New York and Pennsylvania applicants who are not graduates of colleges in good standing must stand a special entrance examination. In the Philippine Islands applicant must have completed a course

the requirements for admission "should be uniform throughout the state."[1] Third, that "a candidate should not be admitted until the end of three full calendar years of law study."[2] Fourth, that the exam-

of studies equivalent to that provided to the Government Normal School.

In the following states no general educational qualification of any kind is required, to-wit: Alabama, Alaska, Arizona, Arkansas, California, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Porto Rico, Tennessee, Utah, Virginia and Wyoming. In Missouri a "grammar-school" education is required and in addition thereto a knowledge of certain specific subjects of learning. A high school certificate or college diploma constitutes sufficient evidence of proper equipment, or even less than a full high school or college course, provided the work student has already completed is sufficient to meet the requirements of the board. In Texas there are no requirements except that the board of examiners may reject any applicant who shows himself "deficient" in general education.

[1] That the examinations of candidates for admission to the practice of law should be uniform throughout the state is now well recognized in most states by law, or by rule of court requiring all applicants to take their examinations before some board of law examiners appointed by the court of last resort. In some states, however, the ancient practice still obtains of admitting candidates before the local tribunals or on examination by the local bar, to-wit, in Alabama, Alaska, Indiana, Kentucky, Mississippi and Nevada.

[2] *Term of Legal Study.*—Most states now require a definite time to be spent in the study of the law. The most general requirement is that the candidate shall spend at least three years in the study of law either in a law school or law office or partly in one and partly in the other. This is the rule in the following states, to-wit: Arizona, Colorado, Connecticut, District of Columbia, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Philippine Islands, Rhode Island, South Dakota, Vermont, Wisconsin and Wyoming.

In the following states two years' course of study in law is re-

ination of candidates should be before a "State Board of Law Examiners," who should be "appointed by the court of last resort."[1] The statistics furnished in the notes appended to the above recommendations will serve to show how generally these requirements are being adopted and how pronounced has been the drift of public opinion in favor of the efforts of the profession to secure for the people a more competent bar.

quired, to-wit: Hawaii, Louisiana, Maryland, Montana, New Mexico, North Carolina, South Carolina, Virginia, Washington and West Virginia.

In many states there is a tendency to require that a part of a law student's time of preparation shall be spent in a law office. This tendency is due to the gross ignorance usually displayed by law school graduates in matters of pleading and practice during the first year of their practice. Many lawyers contend that the law is a practical as well as a learned profession, and that a candidate for admission to *practice* needs clinical instruction as much as a doctor does, otherwise, he is liable to endanger the interests of his first clients as well as clog the wheels of justice by reason of his unfamiliarity with the local practice. In Delaware the applicant must spend the three whole years of his required time of study in the office of an attorney of ten years' standing before he can be permitted to take the entrance examination. In Nebraska one year of the required three years' course of legal study must be spent in a law office. In New Jersey nine months' law office study is required and in Minnesota and Vermont the requirement is for six months' study in a lawyer's office.

In Oklahoma and Oregon the three years' course of legal study must be certified to by a reputable attorney.

In the following states no required time to be spent in the study of law is required, to-wit: Alabama, Arkansas, California, Florida, Georgia, Idaho, Indiana, Kentucky, Mississippi, Missouri, Nevada, Porto Rico, Tennessee, Texas and Utah.

[1] *Boards of Law Examiners* with power to qualify candidates for admission to the bar are appointed by the court of last resort of the following states, to-wit: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Philippine Islands, Porto

In many states the subjects upon which a student must be examined are set forth, and in New York the Board of Examiners are required to examine the candidates separately on procedure, practice and evidence and require the candidate to reach as high a general grade in this examination as in the examination on subjects of substantive law. This change was made, says Mr. Franklin M. Danaher,[1] a member of the New York State Board of Bar Examiners, because the dockets of the courts were being clogged by the defective and clumsy pleading of law school students. The requirement that a special examination shall be passed on the subjects of pleading, practice and evidence have forced many law school graduates to secure clerkships for one year or more in local law offices and has forced the law schools of that state to give more time to these subjects.

Another subject to which increasing importance is attached in bar examinations is that of legal ethics. Since the adoption of the Canons of Professional Ethics, in 1908, by the American Bar Association, many states, either by statute or by rule of court, require a strict examination to test the candidate's ac-

Rico, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, Wisconsin and Wyoming.

In the following states examinations are held before the Supreme Court itself, to-wit: Florida, Hawaii, Idaho, Montana, New Hampshire, North Carolina, Oregon and South Dakota.

In California and Texas, the examination is before the district courts of appeals or before committee of examination appointed by such district court of appeals. In Louisiana examination is conducted in four districts by four separate committees, preliminary to a special examination by the Supreme Court, and in West Virginia the professors of law of the University of West Virginia constitutes a commission to examine candidates for admission to the bar.

[1] 34 Am. Bar Ass'n. Rep., 784.

quaintance with the provisions of these Canons, and thus magnify the subject of legal ethics in the eyes of the young candidate for admission to a degree that will inspire greater respect for those special rules that regulate the conduct of members of the most honorable profession in the world.

CHAPTER II.

PREPARATION FOR TRIAL.

§ 14. Common Sense.
15. Knowledge of Human Nature.
16. Consultation and the Writing of Legal Opinions.
17. Listening to the Client's Complaint.
18. Sifting the Client's Story.
19. Arranging and Marshaling the Evidence.
20. The Theory of a Case and Its Importance.
21. Discovering and Determining the Legal Outlines.
§ 22. Preparation of Pleadings.
23. Interviewing and Coaching Witnesses.
24. Interviewing the Adversary Party—Interrogatories.
25. What to do With Weak or Dangerous Points in the Line of Battle.
26. "Reading Up" the Law of the Case.
27. Preparations of Address to the Jury.
28. The Three Cardinal Requisites.

§ 14. **Common Sense.**—We begin with a proposition, which cannot be seriously disputed, namely, that *Common Sense* is the foundation of good advocacy. A man may be brilliant as an advocate, and even successful, but the mere dazzle of his splendor will be no light to lighten the path of the inexperienced. On the contrary, it may mislead him by its fascinations, and conduct him into dangerous errors. A brilliant advocate may be bold and win by it; or, if he fail, may cover his defeat by masterly and striking efforts, whereas an ordinary person, failing in his attempted

imitation, would present but a clumsy appearance in his overthrow. *Common Sense,* invaluable in all human pursuits, is of the utmost importance in advocacy. It is the one quality without which all others are useless, and with which almost all others are superfluous.

There is nothing about the trial of a case so unusual or uncertain as to frighten the young advocate. It is a most prosaic proceeding in the great majority of cases, and its sole object is to find out the truth in a certain stated transaction. The young lawyer must, therefore, dismiss all the romantic dreams with which his imagination has encircled the dome of the temple of justice, and enter its gates as he would the precincts of a bank or counting house, with the determination merely to transact the business of his client in as short a time and with as little of the spectacular as possible. Indeed, the young attorney will find that, contrary to his expectations, a little common sense and a large amount of self-confidence will carry him further in the trial of a case than the great mass of legal principles with which he has crammed his head. True, this mass of learning will be of great advantage to him at exceptional moments, and on appeal, but all the little confusing details of the trial of a case are not to be settled by a recourse upon the authorities, but by the application of a little common sense and sound business judgment.

§ 15. **Knowledge of Human Nature.**—An advocate is always dealing with human nature. It is not only the instrument he works with, it is also the field of his labors. Whether he measures his opponent, or estimates the qualities of the jury, or probes the mind and character of the witness, a knowledge of human

nature or human character is the key to success. To treat mankind as mere machines, as some advocates occasionally do, is to show an utter absence of that knowledge which is often the last acquirement but always the first necessity of an advocate. The worst thing a man can do is to treat the jury as though they were so many fools. And this mode of treatment is by no means exceptional. Young advocates, fresh from the glories of their debating societies, are prone to undervalue the commoner knowledge of business men. It is a mistake of youth. Whatever may be their mental capacity, whether the advocate has a stupid or a wise jury, to treat them as unworthy his respect is probably to lose his case, and to discover himself a man of very little wisdom. There are almost sure to be one or two shrewd men on the commonest of common juries, and inasmuch as they will lead the rest, the advocate must beware of making them his enemies, as he undoubtedly will, if he let them suppose, by word or manner, that he considers them of little understanding. This applies also to parties and witnesses.

The advocate, therefore, should closely study human nature and endeavor to adapt himself to all conditions of men, so as always to be attractive and winning, never repellant.

§ 16. **Consultation and the Writing of Legal Opinions.**—The giving of legal advice is one of the most important and lucrative features of the advocate's office work. Sometimes this advice is oral; more often it is in the form of a written brief. An attorney should never permit himself to deliver an opinion offhand on any point of law about which he has any doubt. The best practice is to request the client to re-

turn again when the attorney will be prepared to furnish him with an opinion based on a thorough investigation of the authorities. Often young lawyers look upon it as a confession of weakness not to be able to decide upon a given legal proposition the very minute it is stated by the client. On the contrary he will often find clients who will politely request him to look the question up and be *sure* about it. No lawyer can possibly carry all the law in his mind, and most clients are aware of this fact, so that an immediate expression of opinion on the part of the attorney not only cheapens his advice, but insinuates a suspicion into the mind of the client that the attorney is trying to shine in a false light. It also makes a client feel, especially where such impromptu advice has to be recalled on more mature reflection, that the attorney is a man that acts impulsively and not considerately, and therefore, not a safe and absolutely reliable counsel.

§ 17. **Listening to the Client's Complaint.**—The earliest intimation the practitioner will have of his cause will usually come from his client, who seeks his advice either as to the advisability of bringing suit or of maintaining a defense. Even the most uncouth and unlettered men have the faculty of imparting their version of a matter more clearly in their own rambling way than by answering an attorney's questions. They have turned it over repeatedly in their minds, and will tell most, if not all, of the salient facts, if permitted to take their own time and their own method. Hence, the lawyer must be prepared to sit, it may be for hours, listening carefully and with sympathy to a voluble account (sometimes interspersed with imprecations or with tears) and out of the mass of chaff he must extract the grain. When the client has told all

he can remember and has fairly emptied himself of his case, the advocate may then catechise him, sifting his statements and cross-examining him as vigorously as though he were his antagonist. Thus, he may often discover important facts which he has either neglected to mention or has intentionally concealed.

§ 18. **Sifting the Client's Story.**—The purposes of this severe examination are, first, to ascertain if there be a probability, upon legal grounds, that a recovery can be had if suit is brought; and second, to determine whether it is advisable, under all the circumstances, to institute legal proceedings, assuming the suit would be successful. To attain the first purpose the attorney will have recourse to his store of technical knowledge, and if he be at all in doubt he will frankly state that he needs time for considering the question and investigating the authorities. In determining the advisability of bringing suit, as a matter of policy he will seek with all proper regard for his client's feeling to find out from him the situation of his family or business affairs, and whether the institution of an action would in any way jeopardize his more important interests. He will particularly inquire respecting the solvency of the party against whom suit is to be brought, that he may not waste his own and his client's energies in attacking a man of straw. If the client be sued and consult his attorney as to his defense, the same minute examination will be necessary, for it is a common trait among litigants to believe they can prove their case without difficulty, but that their adversary will be hampered by a failure of evidence at every step. The client will often undertake to provide ample proof of each fact material to his case, but the advocate is never to rely upon that assurance. This

sifting process has a further value; not infrequently the client has reasoned out a plan of action or a series of arguments which will prove of real value to his counsel in fighting the battle. But the counselor will never forget that he alone is the commander-in-chief, and though he stand willing to avail himself of wise and practical suggestions or sound argument offered by his client, he never allows the legal opinions of a layman to override and direct the actions of a professional adviser.

§ 19. **Arranging and Marshalling the Evidence Before Trial.**—After the witnesses have been thus subjected to examination and study, it will be advisable to write down on separate sheets of paper what each one will testify to, and indorse this abstract with the name of the case and of the witness. These are kept together, and will prove of inestimable value at every stage of the litigation; for it frequently happens, after a lawyer has filled his mind with his case, there is a postponement until some remote time, and in the interval his memory loses its first vivid impressions of nice points and slight incidents.

Where the advocate's evidence consists of documents, it is of prime importance that he see the document itself, and not trust to another's recollection of its contents. His personal inspection may reveal erasures and alterations which must be explained, fatal ambiguities or ruinous clauses and conditions. It will greatly assist him in mastering the facts to visit the place in which occurred the accident, crime or transaction in question. The judge and jury will be ignorant of the situation, and his own observation will enable him to be far clearer and more accurate in depicting the scene than will the study of diagrams and the reports of witnesses.

After the advocate has marshalled all the facts which he has gleaned from men, documents and localities, he will crystallize his information by reducing the whole to writing in narrative form, so that anyone, by reading his abstract, may derive a distinct and adequate idea of the case.

§ 20. **The Theory of a Case and Its Importance.**— The theory of a case is that particular line of reasoning of either party to a suit, which aims to bring together certain facts of the case in a certain order or logical sequence and interrelate them in such a manner as to produce in the mind one definite result or conclusion, which the advocate believes entitles him to the judgment or decree of the court under the application to such result or conclusion of certain well known principles of law.[1] The theory thus constructed lies at the foundation of the advocate's case. His pleading outlines his theory; his evidence fills it in and gives it shape; and the principles of law which he cites must support the result which his theory has produced.

The law insists that every case proceed upon some definite theory. Although, under our modern codes, pleading has been made so simple a matter as almost to encourage negligence, nevertheless courts draw the line at haphazard and speculative litigation. A party cannot make indefinite and uncertain allegations in his pleadings and then enter a trial aimlessly, permitting the evidence to carry him where it will, and finally insist on one or the other of the different phases of

[1] De Quincey says: "A theory takes a multitude of facts, all disjointed, or, at most, suspected of some inter-dependency; these it takes and places under strict laws of relation to each other."

his case which seem to him at that time most desirable.

Moreover, while a failure to determine a theory at all or a mistake in selecting a proper theory is not necessarily fatal, it always injures a case. Sometimes a trial court will assist the young advocate, who comes into court without any definite theory as to his case, to find one, by inquiring, upon objection of the other party to the introduction of certain evidence, what the advocate is "trying to prove by that witness," and then as to "what bearing that evidence will have upon the case." In his answer to these questions, an attorney who comes into court without a well constructed theory of his case, is forced to declare one on the spur of the moment or seriously affect his chances of a verdict.[1]

More important in some respects, probably, than the construction of a theory, is the determination of an accurate hypothesis on which to construct the theory. Uberweg defines an hypothesis as "the preliminary admission of an uncertain premise which states

[1] "The same case," says Mr. Elliott, "may be gained on a sound theory that would be lost on a bad one. One advocate may take the same facts and secure a verdict, while another will be unable to frame a theory that can be successfully maintained. A case is given by Mr. Bishop in which goods were brought into this country in violation of our revenue laws; they passed the custom-house officers under a permit genuine in form and signature, but procured by bribery. Counsel to whom the revenue officers first applied for advice searched the statutes, and, finding no provision applying to the particular case, advised that no prosecution could be maintained. Another counsel took up the case and secured a verdict. His theory was that the case was the ordinary one of smuggling, and so he put it to trial. When the permit was offered it went in evidence, but was assailed and overthrown on the ground of fraud. The mistake of the counsel first consulted was in framing the theory of the case."—Elliott's Work of the Advocate, p. 76.

what is held to be a cause in order to test it by consequences." The hypothesis, therefore, precedes the theory, and upon a proper hypothesis depends the success of the theory.

The first thing, therefore, which an advocate is to do, after having secured a full statement of the facts from his client, is to fix upon a proper hypothesis. Revolving in his mind the various suggested explanations of the occurrences related to him by his client, the advocate should finally determine on the one which fits in most accurately with all the facts in the case, and on that hypothesis or explanation construct his theory, weaving into the fabric all the evidence which goes to sustain the hypothesis thus selected, and ignoring or discarding, for his own purpose, at least, all facts in the case which would seem to support a different hypothesis.[1] For these latter phases

[1] Thus, take an actual case: A client came to his attorney with this statement of facts: A, the client's wife, carried certain insurance on her life, payable to her husband. She had several small children whom she loved. On July 1st, 1904, she contracted a fatal illness, and, on the 22d of the same month, she died. She had often said, during her illness, that she wanted the money due on the policy of insurance to go to her children. After her death it appeared that, on the 18th of July, she had signed an application for a change of beneficiary, giving the proceeds of the policy to her sister, her only living relative, instead of to her husband. There was evidence that the wife and husband, as well as the wife and sister, were not on friendly terms. A witness, whose name was subscribed to the application for change of beneficiary, said she was not present at the signing, but signed the application at the request of the sister. The sister was in the sick room almost constantly, but seldom alone. The physician who attended the wife said that, on the 18th of July, the wife was so delirious and weak as to be utterly incapable of signing her name. The signature on the application, however, resembled very closely that of the wife, although the application is filled in by another hand. The sister proved up the death and was paid the face of the policy. These were all the facts. It is evident

of the evidence the adversary will undoubtedly find convenient uses in establishing an alibi or other parts of his defense.

§ 21. **Discovering and Determining the Legal Outlines.**—The advocate will now address himself to the law applicable to the facts of his case. Much time will be saved by constructing a written outline of legal propositions involved and considering these strictly in order. The advocate's desire will be to select one branch of the case which appears peculiarly attractive, and make extensive preparation upon it, leaving his forces dangerously exposed at another and less interesting point. The only safe plan is that pursued by a general who arranges his hosts for battle; each

that the attorney in this case was compelled to look around to discover an hypothesis on which to reconcile all these facts before he could proceed a single step. What one shall he take? First, the wife may have signed the application in a fit of jealousy or anger at her husband. Second, she may have signed the application because of the undue influence of her sister. Third, she may have signed the application in blank, requesting that it be filled in making the insurance payable to her sister as trustee for her children. Fourth, she may never have signed it at all, and some one has committed a forgery. Fifth, if the latter hypothesis is correct, the mind at once fixes upon the sister as the one having sufficient interest to commit the crime. To the thoughtful student various facts (more or less numerous) can be found that will coincide with each hypothesis. The attorney for the husband chose the last two hypotheses as the basis of his cause of action. The insurance company, in defense, adopted the first one suggested. Each party then searched for and appropriated all facts in the case that supported their respective hypotheses, and with these ele ments constructed their respective theories.

Suppose that, in addition to this civil action, an indictment is found against the sister for forgery. The state, of course, finds its hypotheses in the fourth and fifth suggestions. The sister, in defense, might adopt either one or all of the others as a basis of defense.

part of the line must be well defended, there must be no gaps. Another seductive temptation will be to investigate the law on some subject very similar to the one the advocate has in hand, yet not precisely his question. The advocate must restrain the mind and command it to investigate the very point which he has noted in his outline.[1]

But perhaps the advocate's powers are not accustomed to this kind of thinking; how is he to know what points of law to investigate and what is applicable to his case? Two species of preparation every lawyer expects to make: a general preparation resulting from his investigation during student days, and from those minute particles of law which he has since learned, line upon line, precept upon precept, here a little and there a little, out of his reading, his conversation with lawyers, attendance at court, and from actual experience in practice. Besides this stock of general working knowledge, which should grow larger and richer with every passing year, is the special preparation required for each case. None but the shallowest of lawyers will ever trust to his general knowledge when a legal battle is to be fought. Hence, to discover the law points involved in his suit, the advocate

[1] For example, if the advocate is inquiring whether a railroad company which has received goods for carriage from one who has stolen them, may detain them from the rightful owner until the transportation charges are paid, the mind by a natural perversity will tend to discover the law governing livery stable keepers, warehousemen, innkeepers and mechanics who detain stolen property under similar circumstances, until their charges are collected. These similar cases may subsequently be valuable by way of analogy, but the advocate's business now is to learn what rule governs railroad companies, and he is to bend his mind to that one task with a grip of steel.

should summon the results of his general preparation; and in the light of all he knows, see how the facts impress him *as a lawyer,* not as a philanthropist, a politician or a citizen. Where do the strong propositions lie? Where are the weaker? What is the natural, the rational and common-sense mode of looking at the case? What legal propositions are instantly suggested by the facts, as applicable to the cause? What are the peculiar features of the case which especially appeal to the legal sense of justice? Do these special features lead the mind toward further propositions? Are these propositions sound or fallacious? Which of them will appeal most strongly to a court? By thus catechising himself the advocate's faculties will be roused into action, and points and arguments will come trooping to his command.

§ 22. **Preparation of Pleadings.**—A subject of the importance of this would seem to demand a separate chapter. But it is hardly necessary for our purpose, especially in view of the large number of text books on the subject of pleading, both at the common law and under the code.

The attorney who is well versed in the law of his case and familiar with the general rules of pleading, will usually find little difficulty in preparing his pleadings. But to the young attorney the most profitable, possibly of all studies, after leaving the law school, is that of the Code of Procedure and the Form Books of his own state. Most of the technicalities of pleading and practice will be mastered in this manner.[1]

[1] During the first years of a lawyer's practice, when time is not so valuable an asset as it is later in his practice, he will make a most profitable investment if he undertake to make a study of the files of old cases stored away among the archives of the clerk's of-

So far as pleading affects advocacy, that is, the influence it may exert, beyond the mere presentation of the cause of action, in winning a verdict, three rules rules might be remembered with profit. *First*: The statement of facts must be clear and succinct. Nothing makes such an impression on the jury, not even the opening statement of counsel as a well worded petition, one not so clouded by legal phraseology and clumsily stated facts as to make the effort of the jury to follow it a matter of too much exertion, but one which interests the jury from the start, and carries them along without any apparent effort on their part until, at the close, they see the advocate's case, from his standpoint, as clearly as he does, and in a measure partake of his enthusiasm. *Second*: Just enough facts should be stated to constitute a cause of action and make the whole transaction as clear as possible from the advocate's point of view. It is very bad practice to introduce all or even a great part of the evidence in the petition, not merely because it is more dangerous from the fact that it makes the proof more difficult, and offers the adversary more opportunities for preparation, objection and delay, but because of its effect upon the jury. A jury should not be told the case in its most favorable light in the petition; otherwise, a slip in the evidence may disappoint the first favorable impression which the case made upon them.

fice. Here will be found forms for pleading, motions, answers, depositions, stipulations, appearances and decrees—forms, too, that have been tested in the heat of actual controversy. A notebook at hand to take down memoranda of the best illustrations of the different forms used under various circumstances, together with a persistent, thoughtful and enthusiastic examination, will save the young attorney many a mistake in pleading and practice, and arm him with the confidence of an older practitioner.

On the contrary, the evidence should unroll before them a constant succession of surprises, confirming and increasing the favorable impression which they first received from the reading of the petition. *Third*: The advocate should never demand exaggerated damages. This is a common fault of some attorneys who think to overwhelm the jury in their favor by such highly colored statements of the effects of the defendant's wrongful conduct, when as a general rule the jury is only disgusted by what they consider an ill-disguised attempt to humbug them. It is useless to create such an impression only to be compelled afterwards to overcome it by the sheer strength of evidence. Nobody can tell what goes to make up the mind of the ordinary juror in deciding a closely contested case; and it is, therefore, always important to watch every opportunity to create a favorable impression, and avoid anything calculated to arouse a feeling of disappointment or contempt.

§ 23. **Interviewing and Coaching Witnesses.**—Next in importance to consulting the client is interviewing the witnesses. To best accomplish this the attorney must know something of them before they are approached. Is their attitude in the case hostile or friendly to his side? Are they under any strong inducement to conceal facts or to distort and color them? Are they to be relied on implicitly or must we verify and corroborate all their statements? Are they liable to be tampered with by the adversary, or are they proof against all corrupt influence? What has been their moral history? These, among other facts, should be considered before the witness is approached, to the end that the advocate may secure from him the most and the best proof he is capable

of giving. What the manner of that approach will be must depend upon the character of the witness. If the latter is thoroughly reliable the advocate may explain, with some degree of fullness, what his position is, but never to such an extent that, if the witness prove false, he can damage his case by betraying the advocate's plan of action to the enemy.

In his dealings with witnesses the advocate will recall that most persons dread to testify in court, and among women this reluctance is almost universal. If it be evident that a particular person knows more than he will tell, and keeps silent in the hope that he may escape the ordeal of testifying, it will be necessary to argue the matter with him in a spirit of friendliness, and seek to overcome his fears or his prejudices by legitimate appeals to his interest and his sense of right and justice. The co-operation of an acquaintance may be secured to induce him to divulge what he knows. If all expedients fail, and the advocate is confident he will not disclose the facts, it will generally be safest not to summon him as a witness, for his stubborn silence upon the witness stand will detract from his side of the controversy.

On the other hand, the advocate may find his witnesses suspiciously talkative; they know too much. He will, therefore, proceed with them, as with his client, sifting their knowledge, cross-examining them as his antagonist will probable do at the trial. He will have them narrate the details of the events about which they seem conversant. "Where did you stand when the accident occurred? Who else was there? Where had you been? Where, afterwards, did you go? Was it daytime or dusk? To whom did you speak?" etc. Especially, the attorney will seek to discover

what are the sources of the witness' knowledge, whether it is derived from hearsay reports or third parties, or from personal observation, and if they are stating what they actually saw and did, or merely their conclusions and opinions, founded upon the facts perceived.

The attorney must warn his witness against a very common trick practiced by some lawyers. In endeavoring to discredit the testimony of a witness they will often ask him on the witness stand whether he has consulted with the attorney of the party in whose behalf he has testified. The first impulse of a witness is to answer, no. This is so apparently false in most cases that a jury is not generally inclined to believe it. The witness should be advised to answer such a question very emphatically in the affirmative, as such an answer can by no possibility injure the case of the party for whom the witness testifies and a very emphatic and abrupt answer often embarrasses the attorney who attempts the trick.

The phrase "coaching a witness" does not at the present time appear to be an attractive term. But, given its proper significance, there is nothing questionable about the process. Coaching a witness does not mean manufacturing evidence to put in his mouth. On the contrary, it means deciding beforehand, how much of the witness' story shall be told on the stand, and the manner in which he is to tell it. Its purpose is to cut out all irrelevant matter and thus make the story of the witness stand out as clearly and forcefully as possible, and to prepare the witness for the tricks of counsel on cross-examination.

The main thing to impress upon the witness, among other things we have already stated, is that, when

upon the witness stand, he speak out the answer unhesitatingly, with animation, and in a clear and distinct tone of voice.

Some lawyers advocate the wisdom of taking the affidavits of witnesses of whose fidelity or freedom from influence they are not certain. In case such witness should afterwards be prevailed upon to deny his former statements to counsel his affidavit will not only destroy his subsequent testimony on trial, but cast suspicion on the entire case of the adversary who called him.

§ 24. **Interviewing the Adversary Party—Interrogatories.**—The attorney will not rest satisfied with interviewing all his own witnesses, but will try to see the adversary party and those whom he expects to call. This is liable to be a barren inquiry; still, valuable hints are sometimes dropped which will put him upon his guard against surprise. In the latter investigation he should remember that it is unworthy of his profession to deceive the person interviewed into believing he is conversing with an ally or a friend. It is entirely legitimate, however, to study his demeanor and to question him closely in order to decide how he is to be dealt with on the trial.

Whether it be of any value to submit interrogatories to the adverse party, as is often done, is a matter of much doubt. In the great majority of cases, it is too much to expect that an adversary will deliberately expose the weakness of his own case by answering in the quietude of his own office, and under the direction of his own counsel, leading questions propounded by the advocate on the other side. Moreover, the practice is sometimes a dangerous one. An advocate may very easily lay bare the weakness of his own case while he

is seeking that of his opponent. His earnest and repeated questioning on certain points tends to show that he is on a fishing expedition, and is an implied intimation that he is ignorant of, or has not sufficent proof of, these particular features of his case. Such questioning also, if carried too far, prepares the witness in advance for cross-examination on trial. A cross-examination that can be prepared for months ahead will, most generally, be barren of results.

Interrogatories, in order not to be dangerous to the party asking them and possibly valuable, should be very brief, cover all the various topics of the case, so as to disarm suspicion and lay absolutely no emphasis on any particular phase of the examination. In such case a defendant may so far forget himself as to enter into long explanations of the short and difficultly answered questions thus submitted. If he does, the advocate will be furnished, if not with additional evidence, at least with enough serious admissions on the part of his opponent to embarrass the latter very much on cross-examination.

Answering interrogatories will seem from what we have said to be a simple matter. So it is, if care is observed in certain particulars. *First*: The questions propounded should be answered briefly. The advocate should not go at all into details or show in the slightest degree his plan of defense. *Second*: Every question should be answered with candor and accuracy. Nothing is so fatal before a jury as evasion or attempted evasion, unless it be deliberate inaccuracy of statement. *Third*: The advocate should not argue his case with his opponent in answers to interrogatories propounded, nor show the slightest interest or feeling in respect to any particular question; for, in

the former instance, he plays his best cards in a preliminary game that does not count, and, in the latter case, he betrays his weak points to the enemy before the battle, and may expect repeated and redoubled assaults in that direction. *Fourth*: Every answer given must stand the test of cross-examination. Nothing is so embarrassing and provoking as to find oneself tied up on the trial of a case by unnecessary and equivocal statements made in answer to interrogatories submittted before trial.

§ 25. **What to Do with Weak or Dangerous Points in the Line of Battle.**—Should a point which tells against a party be ignored by him in preparing for trial? Emphatically no. *First*: Because, the judge or jury will not ignore it. To them this point will stand out as a great obstruction, and conceal all the other phases of the case, and the disappointment will be keen if the advocate fails to remove it. His failure in this regard will also raise a suspicion of concealment against him, beside which there is no more damaging impression which an attorney can arouse in the minds of the jury trying his case. *Second*: Because such a point is not often absolutely insurmountable. It may not, possibly, be successfully contradicted, but its value as evidence may be very materially diminished by a clear explanation and a bold assault upon it. Evidence of surrounding circumstances, also, may serve to obscure and cover up the point so that it no longer stands out so prominently in the mind of the judge or jury. It must also be remembered that these dangerous points, so called, are often based solely on circumstantial evidence, and evidence of that character, however strong, is not held in favor by juries. Let the advocate, therefore, approach it confidently and without fear or concealment.

§ 26. **Reading "Up" the Law of the Case.**—Up to this juncture the advocate's examination of the law governing his suit has been superficial, and has been guided by his general preparation before referred to; now, he should begin to read up on his case, holding his mind open to new impressions and suggestions. Here he will experience one of the keenest delights of practical legal study, when some chance remarks of a court or the facts of a reported case suddenly send a flash of light upon his inquiry, and he sees a bright, fresh argument of which he had not even dreamed. The attorney should first read his own state reports and statutes, for many young lawyers who have pursued their studies at an institution where reports of one particular state are most frequently cited, acquire an undue friendliness toward such reports, and are reluctant to have recourse in the first instance to those of their own jurisdiction, preferring to begin their researches among cases far from home. In his investigations the advocate should try to forestall his adversary's arguments, and be prepared to meet and match them, since he is a poor lawyer who can see only one side of a case. Finally, when he has exhausted the law in his researches and has caught and chained every legal argument which the facts suggest or afford, he should cull out a few of the strongest, clearest and most convincing ones and throw his entire weight upon them, avoiding the folly of elaborating a long, involved argument in which he clutches at every straw and splinter that floats within his reach. The advocate should let all hair-splitting and scholasticism go; he should give forth great masses of light and strive for strength and clearness, not prettiness; conviction, not ingenuity.

§ 27. **Preparation of Address to the Jury.**—Thus far we have dealt with the argument on the *law* side of the controversy. Much the same method will be pursued in discovering arguments by which the advocate seeks to prove to the jury the existence or non-existence of some fact in dispute. He will never forget that he is addressing unlearned men, men who are unaccustomed to reason deeply or to hold a long train of arguments in their memories. What they can comprehend must be simply and plainly told. The advocate should ask himself what arguments would appeal to the ordinary man, and use these rather than others which are fanciful and abstruse. The advocate should speak with a plan in his mind. Nothing is easier, for there are three great divisions under which may be included all he cares to say in an argument upon the facts before courts or juries: *First*: The *right* (the law of the case). *Second*: The *wrong* (a discussion of the evidence and what it proves). *Third*: The *remedy* (what verdict ought the jury to render in the light of the law and the facts)? Thus every case may be argued according to the syllogism—the major premise being "the law," the minor premise "the evidence," and the conclusion "the redress." The form of the whole argument is as follows: "The rule of law is this: the facts of the case are these, and bring it within the rule stated; therefore, the plaintiff is entitled to recover." Then let the advocate shut himself in his room and speak his entire argument aloud to an imaginary jury, exactly as he intends to deliver it in open court.

§ 28. **The Three Cardinal Requisites.**—In all his labors, the advocate should observe three cardinal requisites: method, concentration and enthusiasm.

Without the first, his efforts will be spasmodic and abortive. He will feel that he is accomplishing little, and discouragement and listlessness will sap his strength. But where his work proceeds according to system, it acquires a momentum carrying it on to its consummation, while the energy expended is proportionately conserved. To the task in hand the lawyer must bend his attention with an iron determination. For him, nothing in the world is so important as the work before him. Into it, he must put his whole being. With this strain of the mind must co-operate an enthusiasm for the undertaking which is proof against interruptions and undaunted by difficulties. It must buoy his spirit and quicken his wit, until he beholds, lying completed before him the task from which he shrank, but which has yielded to his perseverance. Never for one instant, will he indulge the fatal desire to perform first, that which is easy and agreeable, leaving the stern, hard problems to await a more convenient season. Intricate or easy, repellant or attractive, each will be solved as it presents itself, zealously, systematically and with unwavering purpose.[1]

[1] When asked his rule of work, the late Lord Russell answered as follows: "If you ask me to reduce the common habit of my life to formula, I will tell you that I have only four rules to guide me in preparing my work—first to do one thing at a time, whether it is reading or eating oysters, concentrating such faculties as I am endowed with upon what I am doing at the moment; second. when dealing with complicated facts, to arrange the narrative of events in the order of time. My third rule is never to trouble myself about authorities supposed to bear on a particular question until I have accurately and definitely ascertained the precise facts; and, lastly, I try to apply the judicial faculty to the case before me, in order to determine what are its strong and weak points, and to settle in my own mind on what the issue depends."

CHAPTER III.

OPENING PLAINTIFF'S CASE.

§ 29. Confidence in his Case.

30. Narration not Argument in Opening Statement.

31. Anticipating Defendant's Case.

32. Redundancy of Expression in Opening Statement.

§ 33. Ornamentation and Illustration in Opening Statement.

34. Order and Arrangement of Facts in Opening Statement.

35. Moderation in Opening Statement.

36. Length of Opening Statement.

§ 29. **Confidence in His Case.**—The first thing for the advocate to do in opening his case is to impress the jury with the idea that, at least, he believes in it himself. This may seem almost too obvious a truism to mention, and no doubt it is present to the mind of every advocate. We all know it, or believe we do. The youngest student will say: "Of course you must make the jury believe that you think your case is an honest one. Everybody knows that." Granted; but it is not the simply *knowing* it, but a very different thing, viz., the *making the jury believe this.* There are those whose manner is such that they scarcely ever seem to believe in their own case. A want of seriousness has characterized their tone and language. This is a fatal blunder of style. There is nothing which a jury so much detests in the person addressing them as an air of jaunty frivolity.

§ 30. **Narration Not Argument in Opening Statement.**—What is really required in the plaintiff's opening of his case is a simple well-told narrative of the facts. The fewer words the better, and the less argument the more likely is a plaintiff's statement to be believed. It must seem a strange story to the jury if it requires arguing upon before the other side have had a syllable to say in contradiction! An advocate will sometimes in his opening, as though he were stumbling among improbabilities at every step, assert that the plaintiff was on his proper side of the way, and that he will convince them that that *must have been so, because,* etc., etc. This is as bad as an opening can be, because it casts a doubt at the very commencement upon the truth of his own story. The best reason for the jury's believing the plaintiff's story before contradiction is that his witnesses swear to it. When the other side shall have brought facts in conflict with it, the plaintiff's time of argument will have arrived, and his arguments will have a freshness which, if used before, they would not possess; they will work as if their edge had not been taken off by a clumsy exhibition when there was nothing to cut. When there is no grist the miller stops his mill. Another advantage to the plaintiff from not arguing too soon is that his adversary is not able to turn his arguments against him, nor adapt his own in accordance with the plaintiff's theories. At the expense of repetition, this point is impressed upon the student's attention, because it is of the greatest importance; a good cause may be thrown away by a weak and indiscreet opening.

§ 31. **Anticipating Defendant's Case.**—There is another evil—not the least under the sun in advocacy—

which consists in constantly anticipating your opponent's case. It is a similar fault to that of plaintiff arguing in defense of his assertions before they are attacked, but a trifle perhaps more dangerous. Some advocates think it proper to anticipate the defense and demolish it at once. This would doubtless be an excellent mode of warfare if he could accomplish it. But the law gives the defendant the right to present his case, and after that has been done, it then becomes the plaintiff's duty to demolish it. Even if the advocate know the exact line the defendant is going to take, it is not always advisable to meet him half-way. But in ninety-nine cases out of a hundred he does not know the manner in which the latter's case will be presented, although he may know what his defense is. *After* he has opened it and employed his arguments, the plaintiff knows the exact line defendant has taken; and if he cannot beat him then, it is quite certain he could not have done so before. One often hears an advocate say, "he cannot conceive what defense his learned friend can have"—that "it's really, gentlemen, an undefended case." It is impossible to conceive of anything more unskillful and ineffective than this. Such assertions are worse than useless. They are no part of the opening; they are not argument; they lend no emphasis to the statement; and they are not *true* They impress neither judge nor jury; but they sometimes make the counsel who utters them look extremely disappointed. If the learned gentleman on the other side has no case, it will appear without plaintiff's attorney saying so. If he has a case, the plaintiff saying he has none will not alter the fact.

§ 32. **Redundancy of Expression in Opening Statement.**—It would be out of place to say anything further with regard to redundancy of expression, were it

not a prominent fault with many young advocates. The fewest words, as a rule, make the best speech. All the language not required to convey ideas is surplusage, and if used at all, should be of the very best; if not required for use, it should be employed for the purpose of lending dignity or embellishment. It may be said that baldness of expression is not compatible with excellence. It is quite true that the graces of eloquence lend a charm to the speaker as well as the speech. These doubtless should be cultivated and employed when in a state of cultivation, but not before. Redundancy, however, is not a grace, but a deformity, and the way to cultivate that is to cut it off altogether. Poverty of language is one thing, selection of words another, and there may be the greatest poverty of language with the greatest redundancy of words.

§ 33. **Ornamentation and Illustration in Opening Statement.**—Of course no one would say that ornamentation is to be ignored. On the contrary, it should be carefully used, not laid on so as to smother that which it should render more attractive. But even diamonds, scarce and valuable though they be, are frequently out of place by way of embellishment. Illustration sparingly employed is an effective ornament; and so much so, that there is often a danger of even truth and reason being sacrificed to it. Minds are apt to be carried away by a beautiful *simile,* and because *that* is true, are prone to consider that the argument illustrated must be true also. But in an opening speech illustration should be *utterly abandoned.* Fact, and fact alone, is the strength of an opening speech.

§ 34. **Order and Arrangement of Facts in Opening Statement.**—It may be said no one doubts that order

and arrangement are necessary to make a good opening statement. It is so true, that almost every one knows it and no one denies it; but so long as so many advocates act as if they did not know it, and not only neglect all order, method and arrangement, but confuse facts and dates to the annoyance of judge and jury, and to the disparagement of their client, it seems not unnecessary to insist that the strictest attention should be paid to the order of time, the order of facts, and the arrangement of causes and effects. Every statement should be as free from confusion as if the facts had been mapped out on paper with the utmost faithfulness. Every series of facts should be brought down in the strictest order; and if there be many series operating apart, but exercising an influence upon the main action of the drama, they should be brought down in their natural order and sequence until they are all centered upon the common point. In the most complicated and tangled circumstances there should be no confusion. It is the business of the advocate and the art of advocacy to separate them, and to show their relations to one another, their bearings upon each other, and their influence upon the main action. Irrelevant matter, therefore, should be carefully excluded—by no means so easy a task as at first sight appears, and only to be accomplished by diligent study and thoughtful practice. What is the *issue,* and *upon what evidence will it depend?* Determine that first and then the evidence will arrange itself almost naturally.[1]

[1] As an instance, take the following pleadings: A endeavors to set up a lost will. He alleges that it was made and executed on a certain day five years ago, and that it never was revoked. The defendant denies the making in accordance with the requirements of the statute; says that the alleged testator was not of

§ 35. **Moderation in Opening Statement.**—In opening a case, moderation is more forcible than exaggeration. The latter is weakness. To open a strong case is not to prove it. What the advocate should strive to do is to give the substance (somewhat more than an outline) of the case he intends to prove. This should be done so that when the evidence, usually in disjointed, and often in widely separated parts, is pre-

sound mind, memory and understanding; that the will was afterwards destroyed while he was of sound mind, memory and understanding, with the intention of revoking it, and that the plaintiff is not a legatee. Now, it will be obvious here that many issues will present themselves; but it may be equally apparent to the counsel for the plaintiff that the whole question may ultimately resolve itself into this, *whether some particular witness saw the will at a particular time.* This may depend not upon the accuracy of the witness' memory, but upon his credibility. The decision, therefore, may turn entirely upon the question as to whether a certain witness can be believed or not. The execution may be beyond doubt; the sanity of the testator up to a certain time indisputable; the contents provable by some draft or otherwise; the question of destruction or no by the testator, *before a given moment,* uncontroverted; the insanity of the testator *from* a given time also placed beyond controversy; the issue, therefore, will resolve itself into the question whether the instrument was in existence between two given periods, and that must depend upon the *evidence to this fact of the person who saw it in the meantime.* If he be believed, verdict for the plaintiff; if disbelieved, for the defendant. Now, it will be obvious that to lay much stress upon those points which will be placed beyond all dispute as the evidence is unfolded would be wasted energy. The facts should, of course, be stated with due precision and conciseness, but to dwell upon them would only be wearying the jury to no purpose, and diverting their attention from the proper object of inquiry. The thing really to be done is to impress them with the reliability of the witness; if they disbelieve him, the advocate's case is lost; therefore, the latter must guard him against the assaults of his opponent, whose skill will be directed to breaking him down. He will know that this is the key of his position. But how is the witness to be strengthened? If he have no corroboration, must he not stand by himself? By no means. A hundred incidents in the story to which his witness speaks may be corroborated by other

sented piece by piece to the jury, they may see the bearings of each upon that which has gone before, and afterwards upon the whole, and appreciate its value. But a plaintiff should never omit any material point of his case in the opening, because, besides being occasion for a non-suit, it will generally be received by the jury in the form with which he impresses it, and will be accepted by them almost as proof before the evidence comes in support of it. When the evidence does come its weight will often be supplemented by the opening. Although, the facts themselves are neither changed nor exaggerated, they are the more deeply impressed. Suppose an advocate has a number of witnesses to prove various facts which are separate and apparently disconnected from one another, but yet having a bearing directly or indirectly upon the main issue. These witnesses represent those numerous facts, which have happened at different times in different places, yet which are all working towards a common center, confirming and corroborating one another, leading up to, and indeed forcing on the main event of the story. It is obvious that in opening a case of this kind, if the advocate would make the narrative clear, he must deal completely with one set of facts at a time—the earliest in date probably being the best to commence with. These should be made plain and intelligible to the jury merely *as facts,* and no attempt should be made

testimony, and this will tend to show his truthfulness. He must search for this kind of corroboration when he has no other, and if he show that he is generally supported by other, and it may be totally independent witnesses, upon points which neither he nor they deemed material; if he show that the story is consistent in itself, and is likewise compatible with the probabilities of the case. he may rely upon it that the verdict will be his.

to show their bearing upon the main point of the case until the other branches of the subject are in like manner made intelligible. If this be done too early the effect will be lost, the narrative will be disturbed, and the minds of the hearers confused. The first set of facts should be stated and left ready to be fitted in at the right time. The jury, having thus seen the separate parts of the plaintiff's narrative, will perceive readily what position each will occupy, and what relation it will bear to the others. It need scarcely be said, that if the advocate make any part out of due proportion to the rest by exaggeration, it will not fit in, and will spoil the symmetry of the whole. He should seek only to make his statement appear truthful and natural. Short of this the opening will be a failure; beyond it the evidence will be a failure.

§ 36. **Length of Opening Statement.**—It may not be superfluous, in concluding this chapter, to say that a speaker in opening a case should never be rapid. As a rule rapidity of utterance is not a common fault, but there are many who talk too fast, and as a necessary consequence say too little. It is difficult for all who are not the most finished speakers to make a sentence, and it is not easy for juries to follow at all times deliberate speakers who can make one; but what must their difficulty be in following a man who speaks with great volubility, and never makes a sentence at all?[1] Slow, sure and short, is a good motto for young

[1] "Can't make head or tail of him," said a juror after a flippant young lawyer had sat down; "talks too fast." "What's the action for?" asked another. "Is he for plaintiff or defendant?" inquires a third. An advocate had better not open his case at all if he cannot leave a better impression than this—he is simply injuring his client.

advocates. A long opening is wearisome and unnecessary, and can only be made long by repetition. Not that an advocate can deal out speeches by the yard, or cut them off in lengths as required. Indeed, a speech may be very long that occupies twenty minutes; it may be admirably concise and take six hours. The opening in the Tichborne trial for perjury occupied some days, but it is a model of neatness, arrangement and concise narrative. A short speech is more powerful than a long one. When jurymen tap the ledge of their desk with impatient fingers, the advocate may take it for granted he has been already too long, and every additional word may be not only a burden to them, but also to his client. Consistently, therefore, with those graces of diction without which language would sometimes be offensively bald, the fewer words the advocate employs, the better. It by no means follows that he should speak in telegrams, but that mere verbiage should be pruned away, so that there may be greater strength and a more symmetrical and cultured beauty.

CHAPTER IV.

OPENING DEFENDANT'S CASE.

§ 37. General Rules.
38. When and Where to Open the Attack.
39. Effect of Argument in Demolishing Plaintiff's Case.
40. Use of Plaintiff's Witnesses to Prove Defendant's Case.
41. Force of Eloquence in Defendant's Opening Speech.
42. Misstatements and False Representations by Defendant.
§ 43. Arrangement of Facts With Regard to Probabilities.
44. Artistic Arrangement of Evidence.
45. Answering Exaggerated or Improbable Evidence.
46. Effect of Defendant Praising His Own Witnesses.
47. Points of Rhetoric to be Observed by Defendant's Attorney.

§ 37. **General Rules.**—If ever a case looks hopeless, it should be the defendant's at this present moment. The jury, if they had to determine the case now, should be unanimous in favor of his opponent. If the facts are not strong, however, or the counsel is not strong, or has not made the most of his case, the jury will be divided, but none of them, "very unanimous" in the plaintiff's favor. In these circumstances the verdict for the defendant is as good as won. Disaster awaits the advocate for the plaintiff who has not the jury with him at this stage of the case. In a season of such depression an extraordinary accession of good feeling will take possession of the breast of the plain-

tiff's attorney. Wouldn't it be better for all parties to agree and an amicable arrangement be come to? If the defendant's counsel be wise, he will yield to no such blandishments. The flag of truce is but the signal of distress, and he should push on his advantages to their legitimate conclusion. He should not capitulate when he has won the battle, or surrender when the enemy is in full retreat.

It is not, however, invariably the fact that a weak case for the plaintiff is at its strongest at the close. The defendant's counsel frequently strengthen it materially. Sometimes, indeed, the cross-examination of his own witnesses *absolutely proves it*. It follows, therefore, that very great discretion and skill are requisite in opening the case for the defendant. It is surrounded with obstacles, and is a far more difficult task than opening that for the plaintiff.

§ 38. **When and Where to Open the Attack.**—The first thing to decide is at what point to commence the attack. A great deal may depend upon this. The advocate may expend much energy in fruitless work. The weak places are undoubtedly attractive, but, as a rule, should be reserved, because at a later period the effect will be greater and the demolition *appear to* be more complete. The strong points, therefore, should be attacked first, but not by direct blows. One cannot knock down a substantial wall by butting his head against it. There are improbabilities and inconsistencies, perhaps, or partialities to deal with. The advocate may possibly get at these and shake the very foundations on which the whole fabric rests. If the advocate have accomplished anything by cross-examination, it will be of inestimable service at this period of the case. But his speech must be directed

first to weaken before he brings to bear the reserved forces which he has stored up as the result of his cross-examination.

§ 39. **Effect of Argument in Demolishing Plaintiff's Case.**—That which was to be avoided in opening a case for the plaintiff is the strength of the defendant's opening—namely, argument. It is not meant to affirm that one can demolish an isolated fact by argument; but a series of facts, some of which may be true and some false, may be made to demolish one another. If the defendant's attorney can show that, assuming all the facts to be true, they do not *necessarily* prove the plaintiff's case, he will have gone a long way to establish his own. By this mode of proceeding he will already have dealt with the strongest portions of the case against him. When he arrives at the weaker parts he should avoid above all things a furious and vehement onslaught; otherwise they will appear more formidable than they really are. Let the force be proportioned to the task. A well-worded argument will be infinitely more effective than fiery declamation. By removing some of his opponent's points in a quiet but effective manner, the jury will believe the defenddant's attorney must be right with regard to many others that he has not removed. He will gain credit for a great deal more than he has actually accomplished, and his success will have a retrospective effect. In other words, the more respectable facts will get a bad character by being found in company with those which the advocate proves to be weak and corrupt.

§ 40. **Use of Plaintiff's Witnesses to Prove Defendant's Case.**—It often happens that a witness is called for the plaintiff whose evidence is worthless. It may

not be valueless to the defendant. But the latter's attorney should by no means be overeager to attack him. He should be kept as a surprise for the end of the advocate's comments on the plaintiff's witnesses, and then be held up above the crowd and made the principal figure in the group. Whatever he has said in the defendant's favor, will, of course, materially assist and confirm the argument of the defendant's attorney. The latter will, in fact, be proving his case by the opponent's witnesses—a happy mode of conducting a cause to a successful conclusion, when he is permitted to do so. An admission against the party making it possesses a force which belongs to no other class of evidence except documentary.

§ 41. **Force of Eloquence in Defendant's Opening Speech.**—A bad speech will impoverish the best of cases. The defendant's case will in all probability be judged by the speech with which it is introduced, and the first impressions are not easily removed. On the other hand, many a case has been won by the opening speech for the defendant. Everything seemed to be swept away before it, and a clear field left for the evidence that was to follow. And it may be said, if once the defendant's counsel gets a thorough hold upon the jury in his opening speech, the case is as good as won. The evidence will appear to be merely supplementary, to confirm the jury in the opinion they will have formed. It is true facts are more powerful than argument, but when argument and eloquence lay hold of a fact that is not absolutely sound, they will press it out of all recognition, and dispose of it as though it were a bubble. The best case may be ruined by a bad speech, as a splendid fortune may be thrown away by a fool; while a good speech will im-

part, or appear to impart, to a bad case, some of its own excellences. There is nothing of art in the speeches of ordinary advocates, but where it is judiciously employed against an advocate who has none, the result will scarcely be doubtful, other chances being equal.

§ 42. **Misstatements and False Representations by Defendant.**—The fact of a reply looming in the distance should always be borne in mind. The defendant's attorney must anticipate it at every step, and so shape his own arguments that they will receive as little damage as possible from the approaching simoon. A fallacious argument is bad enough, but it sometimes wins; a false one is dangerous and generally fatal. It will place the advocate in the position of being detected in an act of deception. So will opening a piece of evidence that he cannot prove, or asserting that something has not been proved which in reality has been. These are blunders in advocacy which are constantly being made to the detriment of clients; not made from want of practice, but for lack of studying advocacy as an art. When the advocate commences to address the jury, they will adjust themselves to the task of listening as though they were about to be entertained with the second act of an amusing drama. They will readily yield him their attention, and be curious to know what answer he will make to all that has been urged on the other side. They may or may not believe all the evidence, but whether they do or not they will accord the defendant's attorney a patient hearing. But the curiosity of the jury may be quickly gratified. The defendant's attorney may lose their attention and his case by a few sentences, or by hobbling along as though he were doing penance for his client.

§ 43. **Arrangement of Facts with Regard to Probabilities.**—Having disposed of the weaker points of his opponent's case and attacked the strong ones by well arranged argument, the next duty of defendant's attorney will be to present his own facts, and in doing this the great rule to observe is *to arrange them with due regard to probabilities.* This is not always done; it is sometimes not even thought of. The same facts may be so ill-arranged that collateral circumstances (never to be lost sight of, although irrelevant as evidence), may raise the strongest improbabilities against the defendant. On the other hand, by a skillful arrangement the opposite result will be produced. The effect of not observing this rule will be like the false perspective in a well-known picture, where a wagon is on one side of a bridge, the team on the other, and the carter driving them about half-a-mile off.

§ 44. **Proper and Artistic Arrangement of Evidence.**—A great deal will depend upon an artistic arrangement of defendant's evidence at this stage; so that it may not only stand out in the best light, but be so placed that its position may cast his opponent's as much as possible into the shade. As before observed, contrast plays a great part in advocacy. But mere naked contrast is not all that an attorney can make of his facts if they are in contradiction to those of his opponent. He will have but half learned his art if he rests here. He should contrast the opposing facts as forcibly as he can, but so place them that his own will appear to be the more natural when regarded in connection with surrounding circumstances. The next thing for the defendant to do is to introduce his evidence *with a view to effect.*[1]

[1] Take an illustration (if not too humble) from a well-arranged shop window, where many costly articles are exhibited. The ar-

§ 45. **Answering Exaggerated or Improbable Evidence.**—When defendant's attorney has to deal with evidence which is eccentric or absurdly exaggerated, he need not labor as though it were worthy of the gravest consideration, but simply point out its grotesqueness, as though the matter were worthy of notice on that account only. If a witness has sworn something contrary to all human experience, the advocate need not weary the jury by arguing that such evidence is unreliable. It is when he approaches facts within the range of probability, and deposed to by trustworthy witnesses, that his powers of argument will be put to the test. Probabilities must here be relied upon, and the smallest circumstance will often prove of the greatest importance. The case will resemble a puzzle composed of a number of pieces which fit into one another. If there were duplicates of some which did not belong to it, one would examine the *edges,* the *color* and the *grain of the wood,* in order to detect the true from the false. In like manner the defendant's attorney must deal with the facts of his opponent's case where they conflict with his, and yet seem to fit in with surrounding circumstances.

§ 46. **Effect of Defendant Praising His Own Witnesses.**—If the defendant's witnesses are respecta-

rangement is a matter of art and study; mere practice would not produce its effect. It pleases, and one scarcely knows why. It is because no one thing offends the eye by obtruding itself upon one's notice. The harmony produced by the artistic arrangement is such that *the leading objects attract attention without appearing to do so, and are set off by the surrounding articles.* There is no crowding, and everything is displayed. If the defendant's attorney can as artistically arrange his evidence in his speech, it will produce an effect that will not be easily removed. The very "setting out" of his case may win it.

ble, his attorney need not detract from their respectability by over-proclaiming it. The jury will believe the witnesses to be ordinarily respectable unless the advocate take overmuch pains to convince them of it. It is only counterfeit character, like counterfeit beauty, that requires a good deal of touching up. *When a good witness is cross-examined as to character, it is as good as vouched for by the other side.* If one saw a man being led down Fleet street by another who kept shouting, "Here's an honest man! Look at this honest man!" he would suspect the pair of some roguish design upon his credulity. The worst recommendation a man can have is too much praise, and there is no worse advocacy than making a person impossibly good.

§ 47. **Points of Rhetoric to Be Observed by Defendant's Attorney.**—The advocate should avoid parentheses as much as possible; but if he employ one, let it be for the purpose of emphasis. It requires some skill (not so much the skill that comes of practice, but that which is produced by careful study) to do this effectively. If done well, his parenthesis will stand out like the principal object of a brilliant pyrotechnic display; but if ill-performed, it will be more like a damp centerpiece, which becomes a failure and the darkest spot of all.

The best worded sentence he can form should end the speech of the defendant's attorney. A pleasant rhetorical flourish is always acceptable, while a well-constructed peroration has many redeeming qualities It will smooth over many a rugged point that has discovered itself during the progress of his speech, and hearers often persuade themselves that that is a good address which *ends well.* Nor should it be for-

gotten that speaking does not consist in mere words; the effect produced on the mind by a piece of real oratory *is a succession of images.* Men do not hear a great speech so much as they *see* and *feel* it.

It is not meant that a jury should be artificially or hysterically excited, but that, by a proper employment of art, the advocate should cause them, not merely to hear what he says, but to perceive the picture passing through his own mind, and to be quickened with the impulse of his own sensations. This is the art of opening the defendant's case. If effectively performed, the latter's attorney need not fear the reply, although he will utter no syllable without a thoughtful regard to it.

CHAPTER V.

EXAMINATION IN CHIEF.

§ 48. All of the Facts Must be Elicited.
49. The Fewest Possible Questions and Interruptions.
50. Proper and Improper Questions.
51. Irritable and Unintelligible Questioning.
52. Order of Time to be Observed in Eliciting Evidence.
§ 53. Cross-Examining One's Own Witness.
54. Cautioning Witnesses About Rules of Evidence.
55. Leading a Witness.
56. Unnecessary Rapidity and Repetition.
57. Verbose Questions to be Avoided.

§ 48. **All of the Facts Must Be Elicited.**—One of the most important branches of advocacy is the examination of a witness in chief. One fact should be remembered to start with, and it is this: the witness whom an advocate has to examine has probably a plain, straightforward story to tell, and that upon the telling it depends the belief or disbelief of the jury, and their consequent verdict. If it were to be told amid a social circle of friends it would be narrated with more or less circumlocution and considerable exactness. But *all the facts would come out;* and that is the first thing to insure if the case be an honest one. It has sometimes occurred that half a story is told, and that the worst half, too, the rest having to be got out by the attorney in re-examination, if he have the opportunity. Events follow one another in a natural course; and as

one is often the cause and another the effect, the most important results may depend upon the merest trifle.[1]

§ 49. **The Fewest Possible Questions and Interruptions.**—Now, the best thing the advocate can do, on examination-in-chief, is to remember that the witness has something to tell, and that but for him, the advocate, would probably tell it very well, "in his own way." *The fewer interruptions, therefore, the better; and the fewer questions, the less questions will be needed.* Watching should be the chief work; especially to see that the story be not confused with extraneous and irrelevant matter. The chief error the witness will be likely to fall into will be hearsay evidence, either he says to somebody, or somebody says to him something which is inadmissible and delays the progress of events. But the witness being very nervous, the attorney must be careful how he checks the progress of his "he says says he's," or he may turn off the stream altogether. The advocate should pass him over those parts as though he were franking him through a turnstile, and then show him where he is; or as if he were putting a blind man with his face

[1] Take the familiar "running-down case." Two vehicles come into collision, and the respective drivers no less so in their evidence. Each throws the blame on the other, and if both were believed, there could have been no accident at all, because each would have been upon his proper side of the road close to the curb, with the whole width of the road between them. They cannot, therefore, both be accurate. Other witnesses give other impossible stories. The very position of the vehicles after the accident may be a disputed point, and, therefore, no assistance to the jury. But there may be a very trifling scratch or indentation on a wheel or a shaft which may be all-important; and what it was produced by may be more important still. Its direction and shape may also be material. This will show how necessary it is in examination-in-chief to get out every fact, however trifling, that may be of importance to the examiner's case.

in the direction he wished to go, and then left him to feel his way alone. As far as possible, the witness should be permitted to tell his own story, with as little interruption from the advocate as possible, and in all probability he will tell it well enough if the examiner does not confuse him with his brief. If the examiner find that witness is omitting a material point, his duty will be to bring him to it at once. Sometimes, however, in the midst of an important answer a witness is very often interrupted by a frivolous question upon something utterly immaterial. This seems so absurd on paper that it needs an example. A witness is giving an answer when some such question as this is interposed: "What time was this?" or, "Had you seen Mr. Smith before this?" A question is often left half answered by such interruptions, the better half perhaps being untold. "He never asked me about that," says the witness after the case is over; or, "I could have explained that if he had let me." If the question be material, by all means let the answer be taken down; if immaterial, it ought not to have been asked; but once asked, the examiner had better have the answer, lest something should be inferred against him. All unnecessary interruptions produce confusion in the mind of the witness and jury, and tend to the damage of the advocate's case.

§ 50. **Proper and Improper Questions.**—The most useful questions for eliciting facts are the most common-place. "What took place next?" being infinitely better than putting a question from the narrative in the examiner's brief of the facts, which leads the witness to contradict him. The interrogative "Yes?" as it asks nothing, and yet everything is better than a rigmarole phrase, such as, "Do you remember what

the defendant did or said upon that?" The witness after such a question is generally puzzled, as if the examiner were asking him a conundrum which is to be passed on to the next person after he has given it up. Judges frequently rebuke lawyers for putting a question in this form: *"Do you remember the 29th of February last?"* In the first place, it is not the *day* that has to be remembered at all, and whether the witness recollects it or not is immaterial. It is generally the *facts* that took place about that time he wants deposed to, and if the date is at all material, he is putting the question in the worst possible form to get it.[1] Many a good case has been lost—and many more will be—by clumsy questions of this kind at the commencement of a witness' examination. If the examiner leave the latter's mind in a state of bewilderment and confusion, his work will only need to be followed up by a well-delivered question or two in cross-examination to demolish the whole of his evidence.

§ 51. **Irritable and Unintelligible Questioning.**—It may seem unnecessary to observe that no sign of *irritability* should be manifested towards the witness. If he be stupid the examiner's vexation will by no means assist him, nor will a sharp rebuke, such as one too often hears administered. The more stupid

[1] Suppose a lawyer ask a witness if he remembers the 10th of June, 1874; he probably does not, and both he and the advocate are bewildered, and think they are at cross-purposes; but let the lawyer ask him if he was at Niagara Falls that year, and he will get the answer without hesitation; let him inquire when it was, and the witness will tell him the 10th of June. In this way the examiner will avoid taxing a witness' memory; always a dangerous proceeding, and much more within the province of cross-examination than examination-in-chief.

he, the more patient should be the advocate be. A stick is a bad thing to help a lame dog over a stile with, and further, the stupidity is not always on the side of the witness. Every question should not only be intelligible and relevant in itself, but it should be put in such a form that its relevancy to the case may be apparent to *him*. A question, without being leading, should be a *reminder* of events rather than a test of the witness' recollection.[1]

§ 52. **Order of Time to Be Observed in Eliciting Evidence.**—It is a cardinal rule in examination-in-chief, that in examining a witness *the order of time*

[1] The following is an instance: A man brings an action against a railway company for false imprisonment. The facts are these: He lost his ticket and refused to pay; the porter on the platform called the inspector, who sent for a policeman, and then gave him into custody. The best way not to get the facts out is to examine him in the following manner: "Were you asked for your ticket?—Yes." "Did you produce it?—No." "Why not?—I had lost it." "Are you sure you took it?—Quite." "Positive? (This is a good opening for the wedge of cross-examination—a doubt thrown on the lawyer's own witness.)—I am quite sure." "What did the defendants say then; I mean the porter?" (This blunder ought not to have been made.) At this point the witness is in a hopeless muddle, and says:—"I was given into custody."

The story is not half told, although it is one of the simplest to tell. Now the counsel contradicts, by way of explanation, and says: "No, no; do attend." Witness strokes his chin as though about to be shaved. Judge glances at him, and wonders if he is lying. Counsel for the defendants (sure to be eminent) smile, and the jury look knowingly at one another, and begin to think it a trumped-up attorney's action.

Now, start again with another question:—"When the train stopped, you got out?—I didn't get out afore it stopped, sir." "Did anyone ask you for your ticket?—They did;" emphatically, as though he knows now where he is. "Who?—I am sure I don't know who he is; never saw the man before in my life." "Well, well, did he *do* anything?—No, sir; he didn't do nothing as I know of;" evidently puzzled, as if he had forgotten some important event upon which the whole case turns.

ought always to be observed. While a witness is telling his story in a natural manner (which he will generally do if left to himself, and with due attention to the order of time), counsel suddenly breaks in with some such observation as this: "One moment,—What was said when you spoke to the defendant?" The thread of the story is immediately broken, the judge is angry, and the mind of the jury is prevented from following the course of the narrative. If the question be of importance the judge's notes must be altered, and probably will be confused.

Besides this, the breach of this rule tends to multiply itself. The question having been interposed at the wrong time, the judge asks: "When was that said?" The witness becomes confused, tries to recollect, and very likely puts it in the wrong place after all, is reminded that that cannot be, is ordered to recollect himself and *be careful,* and so on, to the confusion of everybody except the opposing counsel, into whose hands the inexperienced examiner is playing. It shows the necessity of every event being placed in its natural order, and of every material circumstance and conversation accompanying that event being given in connection with it, so that everything is exhausted as the story proceeds. If this be not done the client had better have been without the lawyer's services. *Let, therefore, the events be told in the order in which they occurred, with the accompanying conversations, if important and admissible, and their minor incidents if material.*

§ 53. **Cross-Examining One's Own Witness.**—Another rule to observe is this: *An advocate should never cross-examine his own witness.* This again, seems remarkably obvious. But it requires an effort to

obey it nevertheless.[1] It is no part of an advocate's duty to shake his witness' testimony to pieces if he believes it to have been honestly given. Nay, more. A cross-examination of one's own witness may most unjustly bring about a disastrous result. A witness may get confused, and, although, at first might feel absolutely positive, and be justly positive, yet by perpetually harassing him, he may begin to doubt whether he is positive or not, and leave an impression that he is doubtful. Such questions as: "Are you quite sure, now? Are you certain?" are cross-examination, and do not fall properly within the scope of examination-in-chief. "Are you quite sure you have the money in your hand?" would be certain to raise a doubt in the mind as if a conjurer had asked the question.

§ 54. **Cautioning Witnesses about Rules of Evidence.** —Another fault of too frequent occurrence is the repetition of the phrases: "You must not tell us what was said, but what was done." "Did he say anything to you? Don't tell us what it was." The jury, who know very little of the rules of evidence, must sometimes think from the tone as well as the language that the counsel is afraid of something being told that

[1] Before Mr. Justice Hawkins, an English jurist, a young lawyer was conducting a case, which seemed pretty clear upon the bare statement of the prosecuting witness. But the latter was asked: "Are you sure of so and so?" "Yes," said the witness. "Quite?" inquired the counsel. "Quite," said the witness. "You have no doubt?" persisted the counsel. "Well," answered the witness, "I haven't much doubt, because I asked my wife."

Mr. Justice Hawkins: "You asked your wife in order to be sure in your own mind?" "Quite so, my lord." "Then, you had some doubt before?" "Well, I may have had a little, my lord."

This ended the case, because the whole question turned upon the absolute certainty of this witness' mind.

would be adverse to his case, and must wonder at an advocate who asks if somebody said something, but anxiously cautions the witness not to tell what it was. It may be said the caution was necessary; so it might be, but need not be made the prominent feature in the examination. There need not be a fuss about it, as though the attorney wanted to impress the world with his vast knowledge of the rules of evidence. In ninety-nine cases out of a hundred, it is obvious that something was said; the fact will not be disputed, and a leading question will pass the witness over the difficulty, and not confuse his mind by sending it upon an inquiry as to why he must not give the conversation.

§ 55. **Leading a Witness.**—Leading a witness in material matters is a blunder which is not likely to be permitted by the examiner's opponent; but if he do allow it, *it is generally to the examiner's disadvantage.* Evidence that is given in answer to leading questions is of the weakest character. The mere answers of a witness are nothing; it is the effect they have that makes them valuable or otherwise, and a jury always distrusts evidence which comes rather from the mouth of the counsel than that of the witness. As a matter of policy, therefore, apart from the violation of the rules of advocacy or of the practice of the courts, leading questions upon material matters should be carefully avoided.

But although it is by far the best to let a witness tell his story in his own way as much as possible, it is absolutely necessary to prevent him from rambling into irrelevant matter. Most uneducated witnesses begin a story with some utterly irrelevant observation, such as, if they are going to tell what took place at a fire, they will say, "I was just fastening up my

back door when I heard a shout." Witness should be led as quickly as possible back to the fire, and the evidence will come with little trouble.

§ 56. **Unnecessary Rapidity and Repetition.**—There is nothing more common with beginners than going *too fast.* They are frequently told by the judge that they forget he has to take down the answers; and the importance of an advocate's evidence looking well on the judge's notes cannot be exaggerated when he is supporting or showing cause against a rule for a new trial. When the evidence is coming well, there is no doubt a great temptation to let it run too fast, but the examiner must take care it does its proper work, otherwise it will be like a rush of water which shoots over the mill-wheel instead of turning it.

Unless there be a doubt as to what an answer was, the examiner must not require it to be given twice. *"Let well alone."* There is also danger of a witness varying his answer unconsciously if he is asked again and again.

§ 57. **Verbose Questions to Be Avoided.**—Whenever an advocate's question is too long the answer will be worthless. "Will you be kind enough to tell us what took place between the parties with reference to the agreement that was then entered into between them?" This is an instance of verbosity, which shows that in putting questions, *long-drawn sentences should be avoided.* The more neatly a question is put the better, as it has to be understood not only by the witness but by the jury. All that was necessary to be asked might have been put in two questions: "Was an agreement entered into between the parties and the plaintiff?" "What was it?" To frame a question

well is a most important matter; and this can only be done by careful study. Practice alone is not enough, and, indeed, will do very little toward effecting this object; it is more likely to confirm tendencies to verbosity than to diminish them. I am speaking now of the length of questions, and not of the mode of putting them. It is a very little fault to be slow in this particular, provided they are put well and tersely.

CHAPTER VI.

CROSS-EXAMINATION.

§ 58. Knowledge of Human Nature.
59. Dangers of Cross-Examination.
60. Good Temper of the Cross-Examiner.
61. Prejudice and Other Hostile Motives of Witness to be Emphasized on Cross-Examination.
62. Manner, Style and Tone of Voice.
63. Asking Questions Liable to Call Forth Adverse Replies.
64. Cross-Examination of Evasive and Hostile Witnesses.
65. Some Miscellaneous Observations.
66. In Conclusion.

§ 58. **Knowledge of Human Nature.**—Next to examination-in-chief, nothing is more important or difficult in advocacy than cross-examination.[1] Cross-ex-

[1] "The system is as old as the history of nations. Indeed, in this day, the account given by Plato of Socrates' cross-examination of his accuser, Miletus, while defending himself against the capital charge of corrupting the youth of Athens, may be quoted as a masterpiece in the art of cross-questioning.

Cross-examination is generally considered to be the most difficult branch of the multifarious duties of the advocate. Success in the art, as someone has said, comes more often to the happy possessor of a genius for it. Great lawyers have often failed lamentably in it, while marvelous success has crowned the efforts of those who might otherwise have been regarded as of a mediocre grade in the profession. Yet personal experience and the emulation of others trained in the art are the surest means of obtaining proficiency in this all-important prerequisite of a competent trial lawyer. It requires the greatest ingenuity; a habit of logical thought; clearness

amination may almost be regarded as a mental duel between advocate and witness. The first requisite, therefore, on the part of the attacking party (namely, the advocate) is a knowledge of human character. This is the first requisite, and it is an indispensable one. Since almost everybody conceives himself to be a master of this science, and since, if he be not, it is impossible by any means at our disposal to add to his knowledge in that respect, we shall proceed on the assumption that the reader will appreciate many observations which would not be quite intelligible were he ignorant of this profoundest of all learning.

Assuming, then, that the cross-examiner has some knowledge of human nature, he should be able to divine, while the witness is being examined in chief, the kind of man he will have to deal with. He should determine whether he has learned his story by heart; if so, it is probably not *all* true, especially if it be a long and intricate one. This, however, is by no means an unerring test. It may be true, nevertheless. Many policemen learn their evidence and give it off verbatim; yet it is more often than not substantially true. But the advocate will gather from the witness' manner, his mode of answering, his looks, tone, language, gestures, even his very glances, whether he be a false witness or one who is telling a story partly true and partly false, the most difficult of all witnesses to deal with.

of perception in general; infinite patience and self-control; power to read men's minds intuitively, to judge of their characters by their faces, to appreciate their motives; ability to act with force and precision, a masterful knowledge of the subject-matter itself; an extreme caution; and, above all, the *instinct to discover the weak point* in the witness under examination." Wellman's Art of Cross-Examination, p. 24.

§ 59. **Dangers of Cross-Examination.**—Next to examination-in-chief nothing is more important or difficult in advocacy than cross-examination. It is infinitely the most dangerous branch, inasmuch as its errors are most always irremediable. Cross-examination has been likened to a two-edged sword, but it is infinitely more dangerous than that. It is more like some terrible piece of machinery—a threshing machine, for instance—into which an unskillful advocate is more likely to throw his own case than his opponent's.

The dangers of cross-examination, it may be observed, are so subtle that they lurk around the questions of the most skillful. These are like the *marsh exhalations*—invisible, but destructive. A mistake in cross-examination may be fatal to a lawyer's case. A single question may make an opening for a flood of evidence which may overwhelm him.[1] Suppose a conversation to have taken place which is not admissible as evidence-in-chief, but which, if admitted, may have the effect of prejudicing the jury, or of introducing matter otherwise irrelevant, but which, nevertheless, may in some degree influence their minds, it would be

[1] It happened in a certain English case (which was tried before Mr. Justice Denman) that the plaintiff had either kept no account books or had lost them. He depended upon his memory for the particulars of various sums said to have been lent and for the dates, which were not only at wide intervals, but also, many of them, long ago. In examination-in-chief, he was asked if he had an account. He said yes. Made when? Some time ago. How made? From memoranda which were not in court. The account, therefore, was objected to. Now, it was quite possible, if that account had been placed before the jury, it might have wrongly influenced their minds, and it was right to shut it out. The plaintiff was thrown, therefore, upon the resources of his memory, and

the height of folly to put a question which would admit it in re-examination.

Another danger for the cross-examiner to avoid is that of *strengthening his opponent's case by eliciting answers that have more effect upon the jury when they come by way of cross-examination than in chief.* A question is sometimes omitted fairly enough, and for good reasons, by the counsel examining in chief. If the cross-examining counsel be inexperienced, he will probably rush in and get the answer for his opponent. The greater weight attaching to it need scarcely be pointed out. Again, he may get in a conversation that may be fatal to his case.[1] There is still another danger not to be lightly regarded, and that is of *persisting*

with regard to two items only, he was tolerably clear as to the dates and circumstances.

In cross-examination he was asked, "Have you any account or memorandum showing the several sums you claim?" He said, "Yes, it is here," again producing the copy of his account. It was again objected to. Question: "In what sums was it advanced?" Plaintiff looked at his document and said, two sums of twenty-five pounds each, and (*here he was stopped, as he was reading from his memorandum*). Plaintiff's counsel then claimed that the document was in and could be shown to the jury. Mr. Justice Denman held that it was not in evidence, and that no question had been asked respecting its contents. It will be seen from this—and one illustration is perhaps as good as twenty—that a single question in cross-examination might have made that evidence, which by no possibility could have been so made by the other side.

[1] Suppose the question to be the contents of a lost will. A legatee under it gives the following evidence: I remember the fact of the testator making his will. I saw him writing it and I read it at the time. I was left a thousand pounds by it and my two brothers were left severally the same amount. I last saw the will two months ago. Now, it might be that the whole case depended upon the accuracy of the witness' memory, or upon that coupled with his credibility. Plaintiff's counsel is desirous of showing that on the day the will was made the witness went for a doctor and told him, *at that time*, the contents of the will. If this statement

in pressing a question upon a reluctant witness. When you find a witness unwilling to give the evidence you seek, and you have drawn him as near to the point as there is any hope of his being drawn or driven, it is always dangerous to attempt to urge him further. If you have nearly got an affirmative, and you press him overmuch, you may irritate him into giving you a direct negative.

The dangers thus indicated will doubtless suggest many others to a mind anxious to master the rudiments of advocacy. They can only be avoided by careful study.[1]

§ 60. **Good Temper of the Cross-Examiner.**—It will be clear that, to cross-examine with anything like success, the most thorough good temper should be preserved. An ill-tempered advocate would be some-

could be given, and it were identical with that made in the witness-box years after, it is clear that it would go a long way to establish the accuracy of the witness' memory as well as his credibility. But it is not admissible as evidence-in-chief. A question, however, in cross-examination would admit every word.

Nor does the danger cease when this witness leaves the box. The doctor, a witness to the will, may be called. He may not have read it, but an inadvertent question may enable him to say what the last witness told him on the occasion in question.

1 *When to Keep Silent on Cross-Examination.*—A long time ago, in the East End of London, lived a manufacturer of the name of Waring. Among the many hands he employed was a girl of the name of Harriet Smith. Mr. Waring fell in love with her. Had Harriet known he was married, in all probability she would have rejected his respectable attentions. He induced her to marry him, but it was to be kept secret; her father was not to know of it until such time as suited Mr. Waring's circumstances. In the course of time there were two children; and then, unfortunately, came a crisis in Mr. Waring's affairs. He was bankrupt. The factory and warehouse were empty, and Harriet was deprived of her weekly allowance.

One day when Waring was in his warehouse wondering, probably, what would be his next step, old Mr. Smith, the father of

thing like a gibbing horse, he would do everything but go along smoothly. A calm, imperturbable temper is the very triumph of self-command, and one of the most essential qualities of a good advocate. It is useless to make excuses for bad temper, as sensitiveness, indigestion, disappointment, or what not. Good temper is the demand of an advocate's client, and in mere justice to him a lawyer is bound to preserve it. Even if he should be a constitutionally irritable man, he must absolutely conquer his irritability for the time

Harriet, called to know what had become of his daughter. "That," said Mr. Waring, "is exactly what I should like to know." She had left him, it seemed, for over a year, and, as he understood, was last seen in Paris.

She had been gone nearly a year, and in a few days Mr. Waring was to surrender the premises to his landlord. There never was a man who took things more easily than Mr. Waring; leaving his premises did not disturb him in the least, except that he had a couple of rather large parcels which he wanted to get away without anybody seeing him. It happened that a youth of the name of Davis, who had formerly been in his employ, suddenly met his old master, who greeted him with his usual cordiality and asked him if he had an hour to spare, and, if so, would he oblige him by helping him to a cab with a couple of parcels which belonged to a commercial traveler and contained valuable samples? James consented willingly, and lighting each a cigar which Mr. Waring produced, they walked along, chatting about old times and old friends. When they got to the warehouse there were the two parcels tied up in American cloth.

"Here they are," said Mr. Waring, striking a light. "You take one, and I'll take the other; they're pretty heavy, and you must be careful how you handle them, or some of the things might break."

When they got to the curb of the pavement, Mr. Waring said, "Stop here, and I'll fetch a four-wheeler."

While James was waiting, a strange curiosity to look into the parcels came over him; so strange that it was irresistible, and accordingly he undid the end of one of them. Imagine the youth's horror when he was confronted with a human head that had been chopped off at the shoulders! "My hair stood on end," said the

being. He must never even appear to lose his temper, for no one ever believes that a man in the heat of temper means what he says. "Allowance" is always made for this infirmity. But when the jury have reason to make this allowance the chances are that his case is gone—in all probability his client also.

§ 61. **Prejudice and Other Hostile Motives on the Part of the Witness to Be Emphasized on the Cross-Examination.**—But, besides determining whether he

witness, "and my hat fell off." But his presence of mind never forsook him. He covered the ghastly "relic of mortality" up and stood like a statue waiting Mr. Waring's return with his cab.

"Jump in, James," said he, after they had put the "samples" on the top of the cab. But James was not in the humor to get into the cab. He preferred running behind. So he ran behind all along Whitechapel road, over London bridge. By and by the cab drew up in a back street in front of an empty house. James came up panting just as his old master had taken his first packet of samples into the house. He had managed somehow or other to get a policeman to listen to him, and Mr. Waring was arrested and the ghastly contents of the bundles discovered. At the police station the divisional surgeon pronounced the remains to be those of a young woman who had been dead for a considerable time and buried in chloride of lime.

Of course, this was no proof of murder, and the charge of murder against Waring was not made until a considerable time after—not until the old father had declared time after time that the remains were those of his daughter Harriet.

Notwithstanding it was clear that no charge of murder could be proved without identification, the treasury boldly made a dash for the capital charge in the hope that something might turn up. And now, driven to their wit's end, old Mr. Smith was examined by one of the best advocates of the day, and this is what he made of him:

"You have seen the remains?"

"Yes."

"Whose do you believe them to be?"

"My daughter's, to the best of my belief."

"Why do you believe them to be your daughter's?"

"By the height, the color of the hair, and the smallness of the foot and leg."

be false or true, or an artful twister of facts, the cross-examiner will also ascertain whether he has a strong bias in one direction, or a prejudice in the other. If he have a strong leaning to the side of his opponent, he will have the less difficulty in disposing of him, because it will be easy to lead him on until his bias becomes so manifest and overpowering that the jury will discount his evidence, and to such an extent that, if the case depend upon him, they will throw it over altogether. A strong interest weakens the side on which it lies. It will, therefore, be clear that in cross-examining a witness of this kind it will be proper to elicit this at the earliest opportunity. If it comes last it will be far weaker, because it will not altogether undo the effect which his evidence may

That was all; and it was nothing.

But there must needs be cross-examination if you are to satisfy your client. So the defendant's advocate asks:

"Is there anything else upon which your belief is founded?"

"No," hesitatingly answers the old man, turning his hat about as if there was some mystery in it.

There is breathless anxiety in the crowded court; for the witness seemed to be revolving something in his mind that he did not like to bring out.

"Yes," he said, after a dead silence of two or three minutes. "My daughter *had a scar on her leg.*"

There was sensation enough for the drop scene. More cross-examination was necessary now to get rid of the business of the scar, and some re-examination, too. The mark, it appeared, was caused by Harriet's having fallen into the fireplace when she was a girl.

"Did you see the mark on the remains?" asked the prisoner's counsel.

"No; I did not examine for it. I hadn't seen it for ten years."

This evidence proved to be so very material that when it was found on the leg exactly as the old man and a sister had described it, the doctors cut it out and preserved it for production at the trial. After the discovery, of course, the result of the trial was a foregone conclusion.

have made upon the minds of the jury. *The interest a witness has in a case should, therefore, be shown early in the cross-examination,* if it has not been made manifest before. Of course, the advocate's opponent will not leave him this card to play if he can avoid it; but he cannot help his overtrumping him by placing it more prominently before the jury than he would ever permit himself to do; and this it will be the advocate's duty to accomplish.

But it may be the witness has no interest. He may, nevertheless, be a partisan; and partisanship is often stronger than self-interest, although the latter has somewhat erroneously been described as the most powerful principle influencing human actions. The advocate may take it for granted that if his opponent should sometimes anticipate the cross-examiner in showing his witness' interest in a cause, he will never be eager to acknowledge him a partisan. The cross-examiner will therefore generally be left master of the field in this respect, and at liberty to choose his time, place, and mode of attack; and so that it be early, he may do it as he likes. In a great number of cases there is something of partisanship, and it may be taken as a rule that an absolutely unbiased witness is rare. The strong partisan, however, is only produced by public matters, religious disputes, boundary questions, quasi-political inquiries, medical cases, rating matters, running-down causes, and other investigations, where the witnesses seem naturally to take sides.

But suppose the witness has some other motive in giving his evidence. The cross-examiner will endeavor to ascertain what it is. If he watch carefully he will find a difference in tone and manner when he is speaking more directly from the particular motive. Sup-

pose it's revenge? Any point which seems more particularly to damage his adversary will be laid stress upon. Any answer that he makes which he thinks will damage him will be uttered in a more ready tone and with evident satisfaction. It will manifest itself in his voice, in his look, and his whole demeanor. *That*, therefore, must be stamped upon the mind of the jury by the advocate's cross-examination. But there are subtle motives, by no means apparent to every observer, which will, nevertheless, be discovered if the cross-examiner set himself to the task of finding them out. And whatever the motive be, there is some ground-work for cross-examination, except in case of the witness whose motive is simply to speak the truth as he knows it. If this man's evidence does not seriously conflict with the advocate's case he should let him alone.

§ 62. **Manner, Style and Tone of Voice.**—With respect to style, as before remarked, every man has his own, or should have. When he borrows he may show good powers of imitation, but he lacks that which is necessary to carry a man to the highest eminence in any art, namely, originality. With regard to manner, a man should imitate the best. The most eminent are as a rule the most unaffected, and the quiet, moderate manner is generally the most effective. It is not intended to imply that bluster and a high tone will not sometimes unnerve a timid witness, but this is not cross-examination or true advocacy. It is not art, but bullying—not intellectual power, but mere physical momentum. Nor is it intended to be conveyed that an advocate should at all times treat a witness with the gentleness of a dove. Severity of tone and manner, compatible with self-respect, is fre-

quently necessary to keep a witness in check, and to draw or drive the truth out of him if he have any; but the severity will lose none of its force, nay, it will receive an increase of it, by being furbished with the polish of courtesy instead of roughened with the language of uncompromising rudeness.[1] The tone in which questions are asked will not only have a great effect with the jury, but with the witness himself. A cross-examining counsel should always seem in earnest; if he have the appearance of one who is simply endeavoring to amuse an audience, the jury will quickly come to the conclusion that he does not believe in his own case. Manner plays a great part in advocacy. Every one knows that a question in one tone will induce an answer, where in another it will not; that the emphasis upon a particular word may produce a totally different version from that which it would cause if laid upon another. An advocate should never appear to be hostile in cross-examination if he can avoid it; hostility is infectious, it may get into the jury box, and thence to the judge.

[1] A great authority on Rhetoric, speaking on the subject of cross examination, says: "In oral examination of witnesses a skillful cross-examiner will often elicit from a reluctant witness most important truths which the witness is desirous of concealing or disguising. There is another kind of skill, which consists in so alarming, misleading, or bewildering an *honest* witness as to throw discredit on his testimony or prevent the effect of it. This kind of art may be characterized as the most, or one of the most, base and depraved of all possible employments of intellectual power. Generally speaking, I believe that a quiet, gentle and straightforward—though full and careful—examination, will be the most adapted to elicit truth, and that the maneuvers and the browbeating which are the most adapted to confuse an honest witness are just what the dishonest one is the best prepared for." Whateley's Elements of Rhetoric, p. 165.

§ 63. **Asking Questions Liable to Call Forth Adverse Replies.**—It is a good rule in cross-examining a witness *never to ask a question the answer to which may be adverse to the cross-examiner's case.* Nothing but absolute necessity should induce a departure from this rule. There are so many ways of framing a question or a series of questions, that it would disclose a poverty of ingenuity indeed if the cross-examiner asked one that might involve the fate of his client. Many lawyers constantly put questions and elicit answers dangerous and often fatal to their case; whereas, with the exercise of a little ingenuity, they might, by small portions at a time, as if they were enticing a shy bird with crumbs, obtain little by little that which they require as a whole. Not only when doubtful of the answer should this course be adopted, but even *when it is necessary to his case that a particular answer should be obtained.* And it might be suggested, as a good and safe rule, that if he be desirous of getting an answer to a particular question, *he should not put it.* The probability is that the witness will know his difficulty and avoid giving him exactly what he wishes. Besides avoiding the danger of eliciting evidence which may be adverse to the advocate's client, it should be remembered that by cross-examination a color may be given to that elicited in chief, which may not only emphasize it, but *give it the appearance of evidence which the cross-examiner himself has adduced.* Counsel should carefully avoid making his adversary's witness his own by cross-examination, as he certainly will if he obtains answers favorable to the other side.

§ 64. **Cross-Examination of Evasive and Hostile Witnesses.**—If a witness is not altogether straight-

forward[1] he will be on the alert, and unless the cross-examiner circumvent him he will evade his question. It is in such a situation as this that the skill of the cross-examiner is shown. One advocate will sit down baffled, another will obtain all that he requires. A series of questions, not one of them indicative of, but each leading up to the point, will accomplish the work. If the fact be there the cross-examiner can draw it out, or if he do not so far succeed, he can put the witness in such a position that from his very silence the inference will be obvious. In cross-examining a hostile witness upon a point that is material it is sometimes advisable to put ten unimportant questions to one that is important, and when the cross-examiner has put the important one he should put it as though it were the most unimportant of all. And then, when the cross-examiner has once got the answer he wants, he should *leave it;* he should divert the mind of the witness by some other question of no relevancy at all. There is no occasion to emphasize an answer while the witness is in the box if the question be properly put. The time for that will come when the advocate sums up or replies. If the witness sees from the advocate's manner that he has said something which is detrimental to the party for whom he has given his evidence—unless he be an honest witness—he will endeavor to qualify it, and perhaps succeed in neutralizing its effect. If the advocate leave it alone, it may be that his opponent may not perceive its full effect until it has passed into the region of comment. Nothing is more

[1] For different classes of obstructive, hostile and evasive witnesses, and how to deal with them, see chapter entitled "Classes of Witnesses."

unskillful than repeating a question when a favorable answer has been obtained.

§ 65. **Some Miscellaneous Observations.**—It is a good rule *never to put a question in cross-examination without being able to give a reason for it.* Many young advocates rise to cross-examine without the least idea of what they are going to ask, and take the witness back through the evidence-in-chief, as though it had not made *effect enough* upon the jury. Nothing can be more unskillful than this. "Cross-examination," said a learned judge to a junior, "does not consist in repeating in a louder tone the examination-in-chief." Another important rule to be remembered is that it is *not wise to cross-examine for explanations,* unless the explanation is necessary for your case. No doubt there is some degree of fascination in solving a mystery, but when the advocate finds that the explanation of it is immensely to the advocate's disadvantage, he will not quite so much enjoy the quiet smile of his opponent when the latter finds that he has cleared up something which he could not, and which he has purposely left for the exercise of the cross-examiner's ingenuity and fertility of inquiry.[1]

Cross-examining for small discrepancies in conversations is generally useless; always so merely as a test

[1] "Before dismissing a witness, however, the possibility of being able to elicit some new facts in our favor should be taken into consideration. If the witness is apparently truthful and candid, this can readily be done by asking plain, straightforward questions. If, however, there is any reason to doubt the willingness of the witness to help develop the truth, it may be necessary to proceed with more caution, and possibly to put the witness in a position where it will appear to the jury that he could tell a good deal if he wanted to, and then leave him. The jury will thus draw the inference that, had he spoken, it would have been in our favor." Wellman's Art of Cross-Examination, p. 26.

of veracity.[1] Veracity must be tested by divergencies of statement upon material points, and with reference to matters respecting which the witnesses could hardly be mistaken. Differences upon other points merely go to memory, closeness of observation, or descriptive power.

§ 66. **In Conclusion.**—That the modes hinted at in this chapter are useful is a matter not of speculation, but of experience. Many of these hints may appear to be commonplace suggestions; they are the rudiments of advocacy, nevertheless, and rudimentary knowledge often comes to us only after long experience or through the kindness of an experienced friend. Sometimes it comes after wearying disappointments and heartfelt rebukes. These suggestions have been noted with the hope of saving some the weary and watchful labors that so many have undergone. Nowhere has an attempt been made to throw out a hint for the purpose of enabling an advocate to confound or entrap the honest and truthful witness, around whom every protection should be thrown; but our endeavor has been to suggest modes of dealing with the artful and the vicious, in order that deceit may be baffled and imposture exposed.

Another word. When the advocate has studied his hardest to learn how to cross-examine, the next lesson should be how to do as little of it as he can; he

[1] In a case before Mr. Justice Stephen, the learned judge said: "I think it the greatest waste of time to ask questions in order to get contradictions with regard to conversations. There may be material points upon which it is important to cross-examine. If any two persons were to give an account of the conversation which the two learned counsel have been holding for the last hour and a quarter, there would be, I suspect, a vast difference indeed between their statements."

should never cross-examine if he can safely avoid it, and when he does, let the questions be few and with a purpose. The best cross-examiner is generally the shortest.

CHAPTER VII.

RE-EXAMINATION.

§ 67. General Principles.
68. Dangers of Re-examination.
69. Where the Cross-Examination is Favorable to the Re-examiner.
70. Re-examination Where the Cross-Examination is Unfavorable to the Examiner.
71. Seizing Opportunities Offered by the Cross-Examination to Introduce Matter Otherwise Inadmissible.
§ 72. Re-examination in Cases Where Character or Credibility of Witness has been Attacked.
73. Pursuing an Equivocal Reply of One's Own Witness, Elicited on Cross Examination.
74. Repetition of Evidence in Chief on Re-examination.

§ 67. **General Principles.**—This branch of advocacy will not require very elaborate treatment. Not that it is by any means an unimportant subject or a small matter in the conduct of a case; on the contrary, it is worthy of the most careful study, and the following hints may be of some use, while they show the dangers as well as the advantages of re-examination. If it were not necessary, cross-examination would be useless. To restore the ravages that have been made by that destructive engine is the principal duty of this portion of the advocate's work. If he has watched the cross-examination with that unceasing vigilance which he ought to have bestowed upon it, he will have

observed and noted the points that have been made against him. Some of his evidence has disappeared altogether; other portions have received such a shock that they exist in a very rickety and dilapidated form; some other parts have received a coating of interpretation, which must be removed; other fragments lie here and there in a mass of confusion, from which they must be extricated if he desire to re-establish his case. He should begin to repair where the first breach was made. The witness may have given an answer he did not intend, and very much of the subsequent mischief may have flowed from that unfortunate mistake. If, therefore, the examiner set that right, he will easily pass along and repair the damages which have resulted from it. He should proceed in his work of repair as the destroyer proceeded in his work of destruction. Explanations in this stage of the case often make the examiner's evidence the stronger for the confusion in which it has been temporarily involved.

§ 68. **Dangers of Re-Examination.**—But, unless re-examination be absolutely necessary, it should never be used. It is not every trifle that should induce an advocate to commence afresh with his witness. If a trivial and unimportant point has been made, but the leading facts of the case are left undisturbed, the matter should be left to the jury. By not re-examining when not obliged to, the danger of cross-examining one's own witness will be avoided. An advocate is not required to explain everything. It sometimes happens that a witness, from natural suspicion of the intentions of the cross-examining counsel, will not answer intelligibly—will hesitate or stumble. It is not, however, necessary that the advocate should fly to pick him up before he is down. If his evidence-in-chief

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has been fairly given, the jury will be sure to make allowance for subsequent maneuvers to upset him. Whereas, if the examiner rush to the rescue unnecessarily, and endeavor to obtain explanations not vouchsafed to his opponent, the witness will think he is anxious for his answers, and, recovering from his nervousness, fill up the gaps the opposing counsel has left. In other words, the advocate will complete the cross-examination, with this additional advantage to his opponent—that the evidence will look like evidence-in-chief, and not like that extracted by a hostile examiner.

§ 69. **Where the Cross-Examination Is Favorable to the Re-Examiner.**—If an answer to be elicited in cross-examination which is favorable to the advocate's case, it is highly important that he should not appear to be so fascinated with it as to re-examine upon *that*. Something else may be admissible in consequence, and this opportunity should be watched for and seized. If he re-examine upon the *very* fact obtained for him, this result may follow: that his opponent, who, discreetly enough, declined to pursue the subject further, may have the satisfaction of hearing him get an explanation which may neutralize the effect of his mistake. "*Let well alone.*" A favorable answer to the advocate, elicited in cross-examination, is not a subject to re-examine upon of itself, but to be made the most of in his reply.

§ 70. **Re-Examination Where the Cross-Examination Is Unfavorable to the Examiner.**—As the advocate watches carefully the cross-examination of his witness, he will probably be made aware for the first time of many weak points in his case. If there should be one which he has flattered himself has been passed

cleverly by in his examination-in-chief, he may certainly anticipate a well-directed blow in *that* quarter at all events. It is in the remedying of such a misadventure that the art of re-examination consists; and it is only by an intimate *knowledge of the facts* and *their relative bearings* that an advocate will be enabled to set his witness up when his evidence has been thus battered. Sometimes a cross-examination has been so effective that the evidence of a particular witness has been hopelessly demolished. An experienced advocate, under such circumstances, will resign him to his fate. If he have other witnesses, upon whom he can rely, his task will be with them; if not, the case must fall with the witness.

§ 71. **Seizing Opportunities Offered by the Cross-Examination to Introduce Matter Otherwise Inadmissable.**—Next to carefully watching for any points that may be made against him, a no less important duty of the advocate will be to *see how he may turn an answer to his advantage.* His adversary may not be a very skillful or experienced advocate; he may be an indifferent cross-examiner; in which event the advocate may safely trust him to play into his hands. He will get portions of conversations which will make the remainder admissible; perhaps put in documents which will give him the same advantage, besides affording him the right of reply; and if the advocate have been considerate, he will have left his opponent to follow up a question or two put for the express purpose. This does not imply that he will have left anything out in his examination-in-chief which it was material to prove; that would be the height of folly. The advocate must always assume that his opponent will not prove his case for him. We speak only of matters

which he himself cannot get in, and which, nevertheless, have an important bearing upon his case.

§ 72. **Re-Examination in Cases Where Character or Credibility of Witness Has Been Attacked.**—The advocate must watch also to see whether any attack be made upon his witness in cross-examination. If his credibility be assailed he must be prepared to re-establish it if necessary, for that is the foundation upon which his evidence rests; and he must do it by questions that will elicit explanations of circumstances left doubtful, by removing the grounds of suspicion, and giving the real character to a transaction capable of two constructions. When this is properly done, nothing is more effective with a jury; they will feel as though they had been relieved of a burden. They will be pleased to find suspicion removed from a person whom they desire to believe; and not only this, the impression of having been imposed upon will also be removed, and their minds, temporarily disturbed, will settle down, as it were, into a state of tranquillity and satisfaction. Cross-examination as to character is at most times an uncertain performance. One never can be sure as to the view the jury will take. It is the part of an advocate's duty which they least like. It need not be said it is the advocate's bounden duty to protect his witness to the utmost of his power. Sometimes he may do it by way of objection, but if not, he must exercise his best skill to effect his purpose by re-examination.[1]

[1] One instance may be given, of many, where character was once cruelly assailed in cross-examination by an inexperienced advocate, and upon whom it recoiled with crushing severity. He asked a witness if he had not been convicted of felony. In vain the unfortunate victim in the box protested that it had nothing to do

When questions have been asked on cross-examination as to character and have failed, it is far better for the advocate to deal with the matter in his address to the jury than to put the stereotyped question in re-examination: "Is there any pretense for suggesting," etc., etc.? The first denial answers all purposes for the time being; and the mere repetition of it adds no weight; besides, the natural indignation arising from the circumstances will be all the better for not being exploded too soon. A quiet and indignant protest to the jury will be all that is necessary.

§ 73. **Pursuing an Equivocal Reply of One's Own Witness, Elicited on Cross-Examination.**—*Sometimes a question will be put in cross-examination which produces an answer not unfavorable to either side, but which it may not be considered safe to follow up by another.* The advocate will have to consider whether it will be safe on his part to take it up where his opponent has left it, and he will best consider this by weighing the whole of the facts of his case and *the effect of the answer whatever it might be;* or he might put a question or two by way of test, and then abandon it or not as the answers warranted. Again, the

with the case. "Have you not been convicted of felony?" persisted the counsel. "Must I answer, your honor?" "I am afraid you must," answered the judge. "There is no help. It will be better to answer it, as your refusal, in any event, would be as bad as the answer." "I have," murmured the witness, under a sense of shame and confusion very plainly manifest. The triumphant counsel sat down. Not long, however, was his satisfaction. In re-examination, the witness was asked: "When was it?" A. "*Twenty-nine years ago!*" The Judge: "You were only a boy?" Witness: "Yes, your honor." It need scarcely be added that a just and manly indignation burst from all parts of the court, and the comments of the learned judge were anything but complimentary to the injudicious advocate.

opposing counsel may have put a question which has "let in" something as a basis for re-examination; or, on the other hand, *he may have put one which tempts the re-examiner to follow it up*, and by that means may have let him in. The utmost caution, therefore, is necessary in pursuing anything that has been started by the adversary. He is by no means a safe guide to follow, and the less company kept with him the better.

§ 74. **Repetition of Evidence in Chief on Re-Examination.**—Above all things it should be remembered that *re-examination does not consist in repeating the evidence-in-chief, or in explaining answers that are in the re-examiner's favor.* If the latter's case be a good one and his witnesses honest, very little will be left to do at this stage of the proceedings. If it be a bad case and his witnesses the reverse of truthful, all the re-examination in the world will not set them up as they were before. It is of immense importance, and indeed necessary for the purpose of explaining something which has been left obscure, or removing an erroneous impression, or supplementing some matter which, taken by itself, looks to the advocate's disadvantage; for most other purposes it would be worse than a waste of time, since it would unquestionably injure his cause. Re-examination arises from a right to explain. It is often so advantageous that a case may be won by its judicious exercise, while it is usually so innocent of evil that it would require the utmost ingenuity of the most inexperienced counsel to make it the means of losing one. The advocate must have a thorough knowledge of his facts, and have watched every question of the cross-examination with the utmost vigilance, to take the full benefit of his

right and to make his case stand out in the bolder relief which the cross-examination will afford to it. But nothing is more tedious or more irritating to judge or jury than to see an advocate floundering in re-examination among facts which he only displaces and confuses, thinking he must needs ask something because there has been a long and it may be severe cross-examination. *It should be first ascertained what fact has been displaced or obscured, and what new matter introduced,* and then the advocate will know what requires to be re-arranged and what to be explained before he rises to put a single question.

CHAPTER VIII.

SUMMING UP DEFENDANT'S CASE.

§ 75. General Considerations.
76. Right to Argue Upon Antecedent Evidence.
§ 77. Points of Danger.
78. Accuracy and Exaggeration.

§ 75. **General Considerations.**—A few words will suffice for this subject. Not that it is by any means an unimportant branch of advocacy. On the contrary, it is as invaluable as any privilege the advocate possesses. It should be remembered that summing up defendant's evidence is not a repetition of the opening speech, in which his attorney analyzed the plaintiff's evidence with sufficient skill to show how worthless some of it was, and what residuum was left to be disposed of by his own witnesses. If he performed that duty half as well as he should, the parts that he eliminated are gone forever. It only remains, therefore, to meet the matters that require answering with evidence on his part. He has now abundant scope for his powers of reasoning and for analytical comparison. There may be some opportunity, also, for something of declamation, of eloquence and earnestness—it may be, of *pathos* itself. But, if so, it should be remembered that it is the *pathos of facts* and the *eloquence of facts,* too, that he most needs: if these fail, he might just as well beat a tambourine and imagine himself an orchestra.

§ 76. **Right to Argue upon Antecedent Evidence.**—It is not absolutely forbidden to argue upon antecedent evidence, although the defendant's attorney has but the bare right to "sum up." The sum total may be not only his own evidence, but that evidence supplemented in matter *and* weight by the evidence of plaintiff and his witnesses. No rule can be laid down in this particular, nor will the judge be overstrict in keeping the defendant's attorney upon the direct line of his evidence.

§ 77. **Points of Danger.**—As the reply will follow the speech of defendant's attorney, he will, of course, calculate what are the points likely to be made against him, and if he has any knowledge of character at all, he will know what points have most impressed his adversary. Nearly all the cards having been played, he ought to know exactly what are left in his opponent's hand. He must, as a matter of course, strengthen those points which are likely to be assailed, and bring into strong prominence those portions of his case which are established beyond the reach of eloquence.

If he has kept his eyes open, he will not be misled by any feint that may have been made by his opponent. If the latter has discovered a weakness in the defendant's case which defendant's attorney does not perceive, it will be little short of a calamity for his client when plaintiff's counsel comes to reply. This so often happens, that the greatest vigilance is necessary from the moment the case is launched till the last witness has been re-examined.

What word or remark of a witness may be the turning-point in a case, the defendant's attorney can never tell. What may be the test which the jury will apply to the evidence he can but surmise; but that no word

should escape his attention is as certain as that, in surveying the ocean bed, no rock or prominence can be left unnoted with safety to the mariner.

§ 78. **Accuracy and Exaggeration.**—One further observation will be made. In summing up, the defendant's attorney should be sure he exhibits the qualities of a good arithmetician; otherwise, he may upset the calculations of his own witnesses. The jury will tolerate no false casting up. They will require a correct total, whatever they may think of the individual items. Some they may disallow, others they may admit, if the advocate's total be accurate; if not, they may reject the whole with disgust or, even, disappointment. He should bear, also, in mind that if he have two twos he need not labor to convince the jury that the total is four; and, above all things, he should be careful that he does not attempt to prove that it amounts to five.

CHAPTER IX.

THE REPLY.

§ 79. Value of the "Last Word."
80. Securing Attention of Court and Jury.
81. Flattering the Jury.
82. Display of Self-Confidence.
83. Personal Attack on Opponent or His Counsel.
84. Effect of an Earnest and Quiet Manner.
85. Order and Arrangement of the Reply.
86. Attacking Opponent's Case First.
87. Dealing with the Effect of the Testimony, Not the Testimony Itself.
§ 88. Importance to be Attached to the Probabilities of the Evidence.
89. Conciseness in the Reply.
90. The Use of Illustrations and Conventional Phrases.
91. Appeals to Passion or Prejudice.
92. A Temperate and Accurate Style.
93. The Peroration.

§ 79. **Value of the "Last Word."**—The reply is always of great importance, and a struggle is frequently made for the "last word." Many persons affect to disbelieve in it, but certainly not those who are able by their eloquence to avail themselves fully of its advantages. Even evidence itself is sometimes sacrificed for the sake of the reply, although if the evidence be of the smallest value this is hardly a course which ought to be pursued. However powerful arguments may be, facts are more powerful still. Nevertheless, it is frequently a question whether the advocate will rely on his address for the verdict or call witnesses

and give the reply to his opponent. Under any circumstances, however—except in a case where one advocate is powerful and the other weak of speech—the reply is a valuable privilege. Some speeches, doubtless, are worse than none at all, and may even assist the other side by means of contrast.

§ 80. **Securing Attention of Court and Jury.**—No one will doubt that the first thing to do is to secure the attention of the jury. The next, that of the judge. Although this is named second, it is very often of the first importance, as, frequently, when the advocate has not the jury with him, he may win by having the judge. The latter's influence is always powerful; therefore, the advocate should gain his attention if he can. If the judge take the advocate's view of law and facts, the verdict follows either there or elsewhere. He will, however, take at times a somewhat different view both of the facts and the law; and then, in spite of opposition, the advocate must endeavor to win his way with the jury. This is the object of the reply, as of the other processes of the case. And how to accomplish it is a question on the consideration of which too much time and study cannot well be bestowed.

§ 81. **Flattering the Jury.**—In conciliating a jury, so as to put them on good terms with him and secure their attention, the advocate should be careful not to adopt a practice too common with young advocates, namely, that of *flattering them.* The advocate must not forget that their nature is by no means changed because they are in the jury-box. *Stroking* a jury is not a dignified proceeding; talking about their intelligence, as though it were necessary to remind them that they are not altogether fools, is the worst means

to make them believe in *the advocate's* intelligence or knowledge of mankind. Nor do they need to be informed that they are Americans; those who are know the fact; those who are not take it as no compliment to their nationality. Again, obtruding upon them the information that they are *sensible* men will not improve their opinion of the advocate or interest them in any way. What the advocate has to do is not to convince them that *they* are sensible, but—that *he* is! Nor is it necessary to remind them that he is "quite certain that they will take an honest and impartial view of the facts;" this is not replying, nor is it rhetoric; it is the flimsiest of claptrap. Hackneyed expressions are always ineffective, stale, and irritating; they show a poverty of idea as well as language, and exhibit the weakest style of advocacy. There is no necessity to argue with the jury upon their honesty, as though there were some doubt about it; or their impartiality, as if the advocate had a suspicion that they were being influenced by a strong interest on the other side. Any observations will be simply foolish that have for their object the inducing the jury to believe in themselves; a far better attempt will be to make them believe in the advocate himself.

§ 82. **Display of Self-Confidence.**—The advocate should convince the jury that he believes in himself. No one can overestimate the value of faith in one's self. By this is not meant an obtrusive self-confidence or conceit, but an earnest and unassuming self-reliance. Belief is a great power, and always lends something to effort. Belief in self has produced some of the greatest successes the world has seen. George Eliot says: "The greater part of the worker's faith in himself is made up of the faith that others believe

in him." So, faith acts and reacts. Of the two, it is preferable that an advocate believe in himself rather than in his case. If he believe in both, the case should be considered as good as won.[1]

§ 83. **Personal Attack on Opponent or His Counsel.** —Another bad way for an advocate to begin a reply is to attack his opponent or his solicitor, or the client. The jury care for none of them. He has to demolish the case of his opponent, not *him*. Besides, abuse is neither argument nor advocacy; and any personal attack is mere abuse, except when it is used to denounce a witness whose evidence requires to be so dealt with. Nor will it assist the advocate's case to answer any attacks which his opponent may foolishly have made upon him. He should avoid being drawn from legitimate argument into a personal encounter. The dispute is not his, but his client's, and it is extremely selfish to indulge in a personal conflict at the latter's expense. If anything has been said which required an answer from the advocate, the time for giving it was at the moment of the utterance. When the advocate undertakes to reply, it is not *his* case, but that of his client, that demands the individual attention of the jury.

§ 84. **Effect of an Earnest and Quiet Manner.**—Securing the attention of the jury is as much due to the manner in which the advocate addresses his hearers

1 "If," says Whately, "the pleader can induce a jury to believe not only in his own general integrity of character, but also in his sincere conviction of the justice of his client's cause, this will give great additional weight to his pleading, since he will thus be regarded as a sort of witness in the cause. And this accordingly is aimed at, and often with success, by practiced advocates. They employ the language and assume the manner of full belief and strong feeling."

as the substance of what he says. The most thorough earnestness is the all-important quality either to possess or to assume. A quiet colloquial sentence or two, with not too much of solemnity, uttered as if he had the fullest confidence in them without telling them so, and as if he also had the fullest confidence in himself, without asserting it, will be pretty sure to establish a good understanding between him and the jury at the commencement. If he cannot succeed in this his address will have little effect, however powerful; whereas if he do succeed, every argument will have weight in proportion to its relevancy to the issue.

§ 85. **Order and Arrangement of the Reply.**—The next thing to be attended to now, although it was the first thing to prepare before the advocate rose, is *the order and arrangement of his speech.* No address can be good without this, and it cannot be altogether bad with it. The minds of the hearers will more easily follow and appreciate the address when they are taken along the order of circumstances as they occurred, or, to speak figuratively, the main road, than if led a steeple chase across country. The advocate should so arrange the arguments that the jury can see what is to follow as he advances along the line of facts, and it will appear as if it must be correct, because the one fact follows so naturally upon another. The whole case is spread out before the jury like a map, and the better its divisions are traced the more fully will their relative bearing be understood. This will be the result of a due order and arrangement of the reply. The advocate's opponent has made his comments upon the case; has put prominently forward his own facts and placed plaintiff's as far as possible in the shade; has damaged some and demolished others. The plain-

tiff's attorney must now not only perform a like process with regard to the case of his opponent, but must throw light into the dark places and draw out his own facts from their temporary obscurity.

§ 86. **Attacking Opponent's Case First.**—The best advocates (who invariably proceed by system) as a general rule adopt the course of grappling with their opponent's case first. It is fresh in the minds of the jury, and the best time to deal with it is before it has been long enough there to make a deep impression. If the advocate return to it after dealing with his own case, he attacks instead of removing it, and may leave it still the last and deepest impression. In doing this, care must always be taken by the plaintiff's attorney to *avoid dwelling on minor discrepancies in his opponent's evidence or upon the trivialities of the case.* Minute criticisms impair the force of an address like grains of dust in the wheels of machinery. They produce friction and retard instead of advancing the cause. The jury are apt to think the advocate has nothing better to urge, and when he comes to greater matters, he will be jaded and wearied, and a good deal of the effect of his speech will be lost. He cannot assign any position in which trivial criticism should be placed, and the probability is, therefore, that it will be out of place anywhere. If he attempt it before coming to his main arguments the jury will be wearied, and if after, his arguments will lose some of their force. Besides this, he endows trifles with a fictitious importance. He places them before the jury and magnifies them as though he brought them under a lens.[1]

[1] Whately says: "Too earnest and elaborate a refutation of arguments which are really insignificant, or which their opponent wishes to represent as such, will frequently have the effect of giving

§ 87. **Dealing with the Effect of the Testimony, Not the Testimony Itself.**—It should also be borne in mind by the advocate in replying, that what he has really to deal with is not the *testimony* of the witnesses, but the *effect* of it, or the real *evidence* to which it is reduced by process of examination.[1]

If the advocate can deal with the effect of the evidence instead of with the truthfulness of a witness,

them importance. Whatever is slightly noticed and afterwards passed by with contempt, many readers and hearers will very often conclude (sometimes for no better reason) to be really contemptible. But if they are assured of this again and again with great earnestness they often begin to doubt it."

1 A was tried some time since by Mr. Justice (now Lord Justice) Brett. The action was brought by the owner of a valuable horse, against a farrier, for negligence, by improperly shoeing; in consequence whereof the horse fell lame and had to be killed. The plaintiff endeavored to prove that the hind shoes of horses were, to use a familiar expression, "rights and lefts." The defendant swore that this was a total erroneous supposition. His witnesses testified to the same effect. Perjury was not attributed to any of them. They seemed to believe their own testimony, and the plaintiff was not prepared with evidence to the contrary, as the point arose during the trial from an examination of the shoe by the counsel, who placed it in the hands of the defendant, and asked whether it was not made for the near foot. The witness said it would do for either the near or off foot. He was then pressed as to whether he would put it on either the one or the other, as it might chance. He answered, yes. The nails were now placed through the holes, which, being properly beveled, gave to their points on the one limb of the shoe an outward direction, and on the other side a different inclination. The defendant was asked whether, looking at that fact, he was prepared to say the shoe was not made for the near foot. He said it was not. He was then asked how it was that the nails in the two sides pointed at different angles? Answer: "It was the fashion." The Judge: "The fashion with all farriers?" Answer: "Yes." In summing up, the learned judge (taking the testimony of the witnesses, and judging it, not by its truth but from its effect) said, "If you find a general mode of doing a particular thing, you may depend upon it there is some good

it need hardly be said it will be so much the better for his case; so, also, if, instead of attacking the credibility of a witness, he dispute accuracy, his memory or judgment.[1]

Juries never like to believe that a witness has committed perjury, especially if he have no interest in the case. Nor does it please them to hear character assailed. If the advocate fall foul of the jury in these respects, he may as well sit down for all the good he can do his client. The *effect of the testimony* then is what the advocate has to deal with in reply. But if it becomes necessary, as it sometimes must, to ask the jury to disbelieve a witness, and the advocate can put it on no easier ground than that he is untruthful, he should avoid doing it by denunciation; that is only to be used in extreme cases, where virtuous indignation will do some mischief to the inner man if pent up long-

reason for so doing it, especially where it obtains universally in some mechanical business. If all farriers make horseshoes with beveled holes slanting in one direction on one side, and in another direction on the other, you may be sure that is not done from mere caprice. What is the effect of the testimony? It is to show that if the shoe on which the nails slant in a particular direction be placed on the off foot, that they will come out through the hoof and enable the farrier to clench them; but if the shoe be fixed on to the near foot, they will have a tendency to penetrate the frog of the foot, and so cause pain and lameness to the animal. The question is, was that the case here? Was a shoe, intended for the off foot, fastened to the near one?" The jury came to the conclusion that that had been the case from *the effect of the evidence:* the testimony, uncontradicted, being directly to the contrary.

[1] "Men are apt," says Whately, "to judge amiss of situations, persons, and circumstances, concerning which they have no exact knowledge, by applying to these the measure of their own feelings and experience, the result of which is that a correct account of these will often appear to them unnatural and an erroneous one natural."

er; but he will find "half steam up," will carry him along quite fast enough in any event. His just indignation should only be sufficiently let off, that it may communicate itself to the pent-up indignation of the jury, and let that off with it in the shape of a verdict. The best way of asking a jury to disbelieve an opponent's witness is to call attention to the evidence of one or two of the speaker's own witnesses. Some matters will depend partly upon the facts and partly upon the witness' judgment or understanding of those facts to which he speaks; his view may be entirely wrong, and his conclusion, which he puts forward as a fact, wrong also.[1]

§ 88. **Importance to Be Attached to the Probabilities of the Evidence.**—Probabilities are of more value than possibilities. Juries, like other people, attach more weight to them. They are extremely valuable in reply, and should be made the most of. Opportunities which the witnesses had of seeing or knowing that which they depose to is also a matter of the highest moment. The means of forming a judgment is another, and all these may be used with a jury in short

1 Whately confirms this statment. "If," he says, "a person states he saw in the East Indies a number of persons who had been sleeping exposed to the moon's rays, afflicted with certain symptoms, and that after taking a certain medicine they recovered, he is bearing testimony as to simple matters of fact; but if he declare that the patients were so affected in consequence of the moon's rays—that such is the *general* effect of them in that climate, his testimony, however worthy of credit, is borne to a different kind of conclusion, namely, not an individual, but a *general* conclusion, and one which will rest not solely on the veracity, but also on the judgment of the witness.

"Even in the other case, however, when the question relates to what is strictly a matter of fact, the intellectual character of the witness is not to be wholly left out of the account. A man may be strongly influenced by prejudice—to which the weakest men are ever the most liable—may even fancy he sees what he does not."

and terse argument for the purpose of obtaining an adverse opinion to the evidence, without the necessity of asking them to say it is perjured. The advocate should exhaust all arguments before he comes to that, unless he knows that perjury has been committed, and then he should come to it boldly and at once, without giving the perjurer an opportunity of escape. He will have observed that he has left for a moment, but for a moment only, the line marked out, of dealing with his opponent's case before presenting his own. But it is necessary, in order to contrast the evidence, and will materially assist him in dealing with that of his opponent. It will not interfere with the course of the advocate's argument, but will be advantageous to it when he comes to review the facts of his own case.

§ 89. **Conciseness in the Reply.**—At all times the advocate should be concise, but especially at this stage, and as short as may be. If he is not a good speaker it will be better to be brief, because indifferent speaking does not tell very much; and he may well be brief if he is a good speaker, because good speaking tells a great deal. A good speech, however short, goes all the way, but a stretch of mere windy talk invariably stops short of its object. But even a good speaker should guard against smothering his points with too many words; the most fluent advocates require most pruning at the commencement. All that is wanted is to so place the facts that they will stand out boldly defined, like fruit upon a wall-tree where there is not too much wood. Almost a barrenness of language rather than an exuberance will be beneficial. The advocate must avoid clothing a fact with the drapery of fine language, and also the making too many points critical examination; and when once made let it alone.

§ 90. **The Use of Illustrations and Conventional Phrases.**—There is a matter which, but for its constant recurrence, it would not be necessary to mention, and that is, that conventional phrases should, as a rule, be avoided; so should stale adages, which from common use become only one remove from slang itself; they show a poverty of ideas and a lack of originality, besides enfeebling the address. A man does not do himself justice when he has recourse to a commonplace saying for the purpose of illustrating a point. It is neither ornamental nor argumentative, and is more adapted to the Peep-show than the Forum. But the great danger attending commonplaces is that they are so feeble and so easily demolished. What is the use of "Gentlemen, there is an old saying that good wine needs no bush," etc., etc., against a speaker who follows with sound, logical argument; or, if it be a matter of pure inference, who meets such rubbish with the strong and forcible language of common sense? The "old saying" may provoke a laugh, but the new saying is the one that will make the impression. Not that illustrations are to be ignored: they are among the most useful of all the means employed by the rhetorician. They bring home the meaning with a force and power that nothing can surpass; but the illustration, if nothing else, should be original. It should be a flash from the speaker's own mind, not a mere reflection of someone else's lantern, however brilliantly it may burn.[1]

§ 91. **Appeals to Passion or Prejudice.**—The advocate has already been advised against a too liberal

[1] Whately says: "There is very little, comparatively, of energy produced by any metaphor or simile that is in common use and already familiar to the hearer." An illustration, however homely, if original and apt, is always pleasing and forcible.

exhibition of emotion. It need scarcely be added that appealing to the passions of a jury, in reply, in a direct manner is out of place and unfair. They are not to determine by passion or feeling, and attempts to arouse the emotions may mislead the judgment. The sympathies of the jury are a proper subject to reach if the advocate can do it by the facts, and not by meretricious sentiment; this is a legitimate exercise of the art of advocacy and of the powers of eloquence; and the art consists in so presenting the facts that they will accomplish that which the advocate is forbidden to attempt. Any attempt, however, to influence a jury by an appeal to their feelings is certain to meet with reprobation. It is clumsy and coarse, at the best, and as bad as an open act of intimidation; if the advocate cannot reach their sympathies without a violent attack, he had better rest upon his facts and reserve his pathos for his client. Nor will he ever succeed in getting the judge with him if he openly attempt to introduce prejudice. It is a kind of rhetorical burglary, which none but those who cannot effect their object by other means would ever perpetrate. It is logically wrong, as well as morally. If the circumstances are such as naturally excite the sympathies of the jury in favor of the advocate's client, he has no need to make a flourish of trumpets to announce the fact; if they are not such, he will fail to move the jury by the employment of feeble arts for that purpose; besides which, he will probably set the judge against him, if not against his case; for, he may be sure that, in his desire to do justice between the parties, the judge will do his best to prevent such an advocate winning by unfair means.

§ 92. **A Temperate and Accurate Style.**—A reply should be comprehensive and compact; it should be temperate as well as bold. In its moderation will be its strength. Violence of language is invariably weak; loudness of tone but a noisy accompaniment, at the best, which stuns the ear instead of making the speaker heard. With a tone always above the natural key, there can be no modulation, which is the music of oratory; the effect of which is to entertain while the feast of reason proceeds.[1]

An advocate may overdo his own facts, or say too much against those of his opponent; and it is a good thing at the bar, as soon as the advocate can do so, to "let his moderation be known unto all men." And moderation in voice is no less pleasing than in language. Some men shout so in reply that one would think the jury some poor shipwrecked wretches on a rock, while one from shore was trying to make himself heard above the tempest.

§ 93. **The Peroration.**—A word as to the peroration, which should not, like the end of a squib, be all bang, nor like the finish of a rocket, all stars above every one's head. What it *should* be is a common-sense and pleasant finish—attractive, impressive, and as polished as may be. It should leave upon the mind a pleasing recollection. It should be well constructed, appro-

[1] Lord Brougham said of Erskine: "Juries have declared that they felt it impossible to remove their looks from him when he had riveted, and, as it were, fascinated them by his first glance. Then hear his voice of surpassing sweetness, clear, flexible, though exquisitely fitted to strains of earnestness." "His action," says Espinasse, "was always appropriate, chaste, easy, natural, * * * the tones of his voice, though sharp, were full, destitute of any tinge of Scotch accent, and adequate to any emergency—*almost scientifically modulated to the occasion.*"

priate and short. As the exordium is intended, with a few well-chosen words, to secure the hearer's attention, so the peroration is designed to leave upon his mind the satisfaction that his attention has been well bestowed.[1]

1 The following is a peroration from Erskine's speech for the Bishop of Bangor, which may be useful as something more than a mere example of peroration:

"I cannot endure the humiliation of fighting with a shadow and the imprudence of giving importance to what I hold to be *nothing*, by putting *anything* in the scale against it, a conduct which would amount to a confession that *something* had been proved which demanded an answer. How far those from whom my instructions come may think me warranted in pursuing this course, I do not know; but the decision of that question will not rest with either of us, if your good sense and consciences should, as I am persuaded they will, give an immediate and seasonable sanction to this conclusion of the trial."

CHAPTER X.

CONDUCT OF A CRIMINAL PROSECUTION.

§ 94. Order of a Criminal Trial.
95. Prosecution not Persecution.
96. Opening Statement—Avoiding Argument.
97. Opening Statement—Avoiding Exaggeration.
98. Opening Statement—Conventional and Undignified Phrases.
99. Opening Statement—Stating Personal Belief as to Guilt of Accused.
100. Opening Statement—Interpreting the Indictment to the Jury.
101. Opening Statement—Only Facts Bearing Directly on the Issue to be Stated.
102. Opening Statement—Anticipating the Defense.
§103. The Evidence—Order and Arrangement.
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105. The Evidence—Police Testimony Not to be Implicitly Relied Upon.
106. The Evidence—Concentrating Attack on Main Defenses of Accused.
107. The Evidence—Taking Advantage of the Defendant's Cross-Examination.
108. The Evidence—How to Break Down a False Alibi.
109. Closing Address—Temperate Reply *versus* "Earnest Appeal."

§ 94. **Order of a Criminal Trial.**—The first thing in a criminal trial is the arraignment of the accused. To arraign the accused in criminal practice is to bring the prisoner to the bar of the court to answer the matter charged upon him in the indictment. The procedure consists in calling upon the prisoner by name and stating the charge against him, or, if he demands it, reading to him the indictment and demanding of him

whether he be guilty or not guilty, and entering his plea.[1] To the arraignment accused may either plead guilty or not guilty or "stand mute." If the accused refuses to plead, the court instructs a plea of not guilty and the trial proceeds as if the accused had so pleaded.

After arraignment accused has opportunity to interpose certain motions more or less vexatious in their nature as a general rule. He may seek a discharge on motion on such grounds as former jeopardy, denial of a speedy trial to his prejudice, and for prosecution on information without good cause shown where grand jury failed to indict. He may enter a demurrer to the indictment or he may move to quash the indictment on many and various grounds. He may ask for change of venue or removal of cause. If the charge against the accused is indefinite he may demand a bill of particulars. He may demand also a list of the witnesses testifying against him. He then enters his formal plea to the indictment. After that he may ask for a postponement or continuance of the trial on certain grounds.

The selection of the jury is the next important stage in the proceedings. Before this is done, however, the prosecuting officer has the right to enter a *nolle prosequi*.[2] Before, also, the actual selection of the jury ac-

[1] The arraignment of the accused must be the first step in the progress of the trial; it must precede the impaneling of the jury and the hearing of the evidence; and failure to so arraign the defendant is reversible error, which is not cured by arraignment after the trial has begun. Abbott's Criminal Trial Brief, p. 25, and cases cited.

[2] After the jury is sworn the defendant acquires the right to have the cause disposed of by its verdict; and if, without cause or

cused may interpose a demand for a copy of the panel; he may enter, on various grounds, a challenge to the array or entire panel. After these interruptions, if entered, have been overcome, the parties must at once proceed to the task of selecting a trial jury.

Following the selection and "swearing in" of the jury come the opening statements of the prosecution and the defense, about which we shall have more to say in subsequent sections. Then follow in a regular, and, as a general rule, uninterrupted order the introduction of evidence, the closing addresses—the summing up and reply—of counsel, and the charge, instructions or summing up of the court to the jury, after which the fate of the defendant is in the hands of the "twelve good men and true."

§ 95. **Prosecution Not Persecution.**—Above everything, it is important that the prosecutor should exhibit no feeling in the conduct of a prosecution. He is not the offended party nor the minister of justice, as he is sometimes erroneously called. He is the presenter of the accused at the bar of justice, and is the last person who should exhibit emotion. There should appear no anxiety on the part of the counsel to obtain a conviction. Whoever the accused may be, and whoever the accuser, and whatsoever the nature of the charge, there should appear but one unswerving desire on the part of the advocate, namely, to *lay the facts* of the case before the tribunal which is to judge of them. Inflexible justice is required on the part of him who sometimes calls himself its minister. Neither

the defendant's consent, a *nolle prosequi* is entered and the jury discharged, this amounts to an acquittal, which the defendant may set up as a defense to a subsequent prosecution for the same offense. Abbott's Criminal Trial Brief, p. 197, and cases cited.

the shocking nature of the crime, nor the heinous character of the accused, nor the exalted rank of the accuser, nor any other circumstance, should disturb the mind or temper of the advocate.

But it is not in prosecutions for crimes of the deeper guilt that the danger of excited feelings has to be guarded against. In these there is generally too much of the sepulchral tone and manner, as though the wretched criminal were delivering his last dying speech and confession by proxy. It is in cases such as libel, where the circumstances may be particularly aggravated and the accuser a person of distinguished position in society; or it may be in some other misdemeanor of the social sort, where mortal vindictiveness, rather than divine justice, seems occasionally to be the inspirer if not the director of the proceedings.

But whatever may be the nature of the charge or the quality of accused or accuser, *let there be no feeling*—at least, no manifestation of it. Nothing can be worse, either as a matter of abstract justice, or as a matter of mere advocacy. A man who throws feeling into a prosecution, awakens an opposite sentiment in favor of the accused. The sense of fair play, which every American is credited with possessing, is outraged by an attempt to convict a man by declamation and angry expression. Is he guilty? That is the question. The prosecutor is not to denounce the crime; that has no doubt been committed by some one, and is none the deeper or the wickeder, denounce it as he will; he is not to denounce the man; the latter may not be guilty; and if not, shall the innocent be denounced? He may be guilty; what, then, is the prosecutor his judge or—his executioner? So that he will be none the worse, and none the better, the crime no

deeper, and the charge no nearer proof, by declamation or anger. Accused persons have been known to be acquitted through a too intense desire to convict; especially in cases where self-constituted bodies of men support the public morality by public subscriptions.

§ 96. **Opening Statement—Avoiding Argument.**— Another error to avoid is argument at the opening of the case for the prosecution.[1] At this stage there is nothing to argue (unless the prosecutor wants to argue that he is telling the truth), and its principal effect will be to throw doubt on his case. Facts that require nursing the moment they are presented must be weak indeed; and the prosecutor may depend upon it, such swaddling clothes will never keep life in them. What can be stronger or healthier than a plain statement of a simple fact? Aye, but if it be not a simple fact, but a series of compound facts, what then? It is a mere matter of arithmetic. Reduce the compounds to simples; and for such analysis there is no need for argument. The best opening of a case for the prosecution is a clear and concise statement of facts, without embellishment, without argument, and without feeling. It may be neecssary to explain matters, or to separate them, or to connect them, or to treat them in some other manner by way of elucidation; but it is never necessary, and is therefore bad advocacy to *color* them, or in any way to alter their appearance, or apply to them a far-fetched and possibly foreign meaning. Moreover, such a practice very

1 Opening statements should consist of a presentation of the facts intended to be given in evidence by the respective parties, to the exclusion of argument and irrelevant and prejudicial matters. Hochheimer on Crimes and Criminal Procedure (1897), § 241.

often furnishes ground for a reversal, if the accused be convicted.[1]

§ 97. **Opening Statement—Avoiding Exaggeration.** —Again, all exaggeration is to be avoided; the prosecutor should neither magnify that which he can prove, nor open a single fact that he cannot. It is not only bad as a matter of advocacy, but dishonest as a matter of morality. As the jury approaches the evidence of the case by way of examination, the facts should expand upon the view rather than diminish; as diminish they must if the prosecutor exaggerate them in his opening. No art should be employed for the mere purpose of convicting a prisoner, but there should be no abandonment of it because a crime happens to be the subject of the prosecutor's advocacy. It is his duty to convince the jury of the guilt of the accused if he can do so fairly. To accomplish this he must present the facts in their natural order (which is art), and in the most comprehensive manner (which is art), and in the most simple manner (which also is art). But before all things, before even the conviction of the guilty, it should be the prosecutor's care to refrain from stating the smallest matter which in his conscience he does not believe to be capable of proof. If, inadvertently, this be done, as indeed it must sometimes from erroneous instructions, he should spare no pains to disabuse the minds of the jury of the im-

1 Thus it was held in a certain case that an opening address in a criminal case, made by the district-attorney against objection, containing not only a statement of the evidence which it was expected would be introduced, but also a full and exhaustive argument of the case, much of which was based upon a state of facts which did not appear in the evidence, furnished ground for reversal of a judgment of conviction. State v. Williams, 63 Iowa, 140, 18 N. W. Rep. 682.

pression which such a statement may have made. He never can tell what effect a word may have; a verdict may be influenced by the most trifling observation. For this reason he should instantly repair any mistake which may operate against the accused.

§ 98. **Opening Statement—Conventional and Undignified Phrases.**—Another error, very frequently committed, should by all means be avoided—that of telling a jury that the advocate thinks he shall be able to prove so-and-so; or he thinks he shall be able to show so-and-so. This is unfair to the prisoner, if he fails, and is extremely weak, if he succeed. What he knows he can prove, open; what he is doubtful about, leave for the evidence. Need it be said that expressions such as "How on earth could the prisoner have known so-and-so?" and, "How on earth could he have thought so-and-so?" should be avoided, and that language, such as "It is a lie! gentlemen," is not graceful or dignified? Nor should the counsel for the prosecution assume to himself the office of defending the prosecutor or prosecutrix, as the case may be. He may do so in the most efficient manner, if he be a skillful advocate; but that must not appear to be the main object of the prosecution. If Caesar's wife be above suspicion, she will need no defender: and it will be no compliment to say that the advocate is there for the purpose of vindicating her character.

§ 99. **Opening Statement—Stating Personal Belief as to Guilt of Accused.**—The next thing for the prosecutor to remember is, never to say the prisoner is guilty. It is an utterly useless expression, and seems to imply that the prosecutor has a feeling in the matter, even when he may have none. He has to lay the facts before the jury from which no other inference

than that of guilt can reasonably arise. Guilty is the sum total of inferences and probabilities arising from the facts, and is to be pronounced only by those who are sworn to try whether he be guilty or not guilty.

§ 100. **Opening Statement—Interpreting the Indictment to the Jury.**—The *charge* against the prisoner should be stated clearly and concisely. It is not always stated clearly and concisely. The judge, generally, has to tell the jury, after all the speeches and all the evidence, what the charge is and what is the *nature* of the charge. It is remarkable that young advocates, as a rule, both in prosecuting and defending, leave out the offense stated in the indictment. Now, there are many ways of stating a charge, but there is only one way to inform the minds of the jury of the offense which the accused is alleged to have committed. And the first thing necessary is to strip it of the legal jargon in which it is enfolded.[1] The advocate is the interpreter of this unknown thing to the people or "the country." Inwrapped as the simple matter is in the manifold incumbrances and technicalities of the law, how is a mortal common sense jury to know whether the enfolded thing before them be a wolf or one's grandmother? Unless they understand the nature of the charge they will never appreciate thoroughly the finer points of the evidence, which may be so impor-

[1] Since the days of Babel there has been no mortal language less understood of the people than the lawyers' dialect; no man, however deep in linguistics, will ever be deep enough to get to the bottom of that unfathomable vortex. If a person desires to enjoy a piece of real humor, watch a jury while they listen to a prisoner being "given in charge" on some skillfully worded indictment, with complications enough to baffle the father of all worldly complications himself.

tant to lead them to a just conclusion. The advocate must *learn,* therefore, to put the meaning of indictments into every-day language, and then he will reduce it to simplicity in a few words.

§ 101. **Opening Statement—Only Facts Bearing Directly on the Issue to Be Stated.**—Now come the facts; but be it remembered that nothing is to be stated remote or near, that has not a *direct bearing upon the issue.* Everything that may prejudice the jury—as the advocate loves an easy conscience and values his own character for honesty—must be carefully excluded; and above all things he should avoid doing in an oblique manner that which it would be unfair to do directly. Nor is this warning unnecessary. Many have erred inadvertently in their zeal for the "administration of justice," who, in a matter of private and social concern, would guard themselves from the faintest appearance of unfairness. The prosecutor is not to be what is known in some proceedings as a "devil's advocate," employed when they desire to "canonize" a lady or gentleman. He is not required to canonize the prisoner, but to do him as much justice as if he had some sorrow for his situation.

The rule, simply stated, is that the prosecuting attorney has a right to state in his opening only those facts which the prosecution intends to prove, but not those of which he cannot offer competent evidence.[1]

1 The counsel for the accused has a right to interpose and object to any impropriety of the prosecuting counsel in the opening, and, if the court allow him to proceed therein, to take an exception to the ruling, and to request an instruction to the jury to correct the effect of such impropriety. Abbott's Criminal Trial Brief, p. 291, and cases cited. "But the purpose of the opening address," says Mr. Abbott, "is to inform the jury as to the nature of the case in hand, and while deliberate misstatement of fact calculated to prej-

§ 102. **Opening Statement—Anticipating the Defense.**—In proceeding with his statement there is often a danger of the advocate being led into an anticipation of the defense that will be set up either to the whole or to any portion of it. This ought never in a prosecution to be yielded to, if for no other reason, at least for the very obvious one that, if the prisoner be defended, the prosecution has the right of replying. Such expressions as, "It may be said by my learned friend," etc., are not legitimately a part of an opening statement. But it is by no means improper in *favor* of the accused to present that view of the fact which the advocate finds himself obliged to deal with and dispose of. The moment he shows himself eager to convict, the jury will suspect him, or the prosecutor, of vindictive feeling, one of the worst symptoms to manifest either at the bar or in the witness-box.

§ 103. **The Evidence—Order and Arrangement.**—"*Order and arrangement*"—these must be observed if the advocate wish the jury thoroughly to understand the statement he has to make. As the advocate opens his case, so should the witnesses be called to prove it; the continuity of circumstances must not be broken, although there may be divers branches of the subject; there may be many chapters, but they were enacted in order in the real history he is unfolding. The advocate will sometimes find that the depositions are confused and complicated. Before the magistrates, where evidence is taken in portions, as it is obtained, and in the course of many adjournments or remands, it is

udice the accused, and not corrected by the court, would be ground for reversal, the rule is different where facts are honestly stated with the expectation of proving them, which, through some unforeseen circumstances, counsel fails to do."

next to impossible to follow any rule in this respect. But it will be the advocate's duty to separate and arrange the various portions of evidence before presenting them to the jury.

§ 104. **The Evidence—Overlaying the Case with too Much Evidence.**—"Overlaying the case," as it is called, is a dangerous proceeding. It is like taking a feather bed, bolster and two pillows to smother a mouse with, when the feather bed would be amply sufficient if well applied. A number of witnesses cannot agree on all points. We do not mean in words, because that would at once damn their evidence, but as to facts themselves, and if the advocate call a number of witnesses, the chances are that he will call a number of contradictions, and the moment he gets one witness to contradict another upon any point how little material soever, if it be material, the jury, as a rule, will determine that portion of the evidence in favor of the accused, unless other circumstances lead them to a different conclusion. The advocate will have given him already the benefit of one doubt. Then, again, among the multitude may creep in some one or two of a disreputable kind; the advocate may not know them, but his "learned friend," if he have any skill, will soon introduce them to him; and if their character or evidence be "shaky," as it is called forensically, it will lower the average of the whole; at all events the merits of his case will sink with it. It requires a number of respectable witnesses to buoy up a case laden with one whose character renders him unworthy of belief.[1]

1 We may here mention one very important English case in which the Crown was cruelly hoodwinked. It was a case of murder. A very bad case. Horribly brutal. The public were shocked and intensely interested throughout the length and breadth of the land.

§ 105. **The Evidence—Police Testimony Not to Be Implicitly Relied Upon.**—Another matter to be on one's guard against, is being overdone by police testimony. Very few policemen are really untruthful; and very

It was a murder that ranks among the great murders of the world. In consequence whereof there was more bungling among the police and more conflict among police authorities than usual. Borough police and Scotland Yard almost taking one another up if not knocking one another down. All this is a thing of yesterday to one's recollection. When the police had laid hold of the supposed murderer, what scenes were enacted at the police court day by day, and how the conflicting "authorities," with official and non-official jealousy, proceeded on the uneven tenor of their way as well as other people's way! For it was a great and notable murder.

But what is more to our point is not the notoriety or jealousy, or the degrees of activity or non-activity of intelligent or non-intelligent officers, but the Crown Institution itself, and its staff for taking down the "proofs." The "proofs" came thick and fast one may be sure; almost everybody had a "proof." The whole country seemed to have been called from its avocations to see the murder done. The prisoner was seen here and seen there; he was buying in this shop and visiting in that; he was singing in one place and dancing in another; courting in one lonely spot and murdering in another. There never were so many "clews" to a single crime. At last the perpetrator of one horrible murder, at all events, to the satisfaction of one section of the police, would be brought to justice. It would make up for many undiscovered and thrilling crimes. Let no one henceforth say the police cannot "find out anything." Into the office where they take the evidence, or "proofs," there stepped witness after witness—scores of witnesses. Evidence was taken down, sifted, weighed, measured, as it might have been, by the yard; and there stepped in among the crowd one or two of the simplest-looking, "innocentest"-looking young men that could be found in all London, and an innocent-looking woman or two. Now, the Crown, being incapable of doing any wrong, is equally incapable of thinking any evil; so it thought none of these interesting witnesses who gave their story with solemn faces, and went away with proper subpœnas in their pockets.

The trial came on, as, after so much elaborate preparation, it was only proper that it should; and the evidence looked uncommonly black against the unhappy prisoner. An anxious and highly sensational public watched for justice to be avenged. But it was curious

few would unnecessarily "pile on the evidence" against a man; but all are zealous, and zeal is a force, as we all know, that will sometimes impel us beyond the boundary line of discretion. They require to be kept in with a steady and firm hand, for much zeal on their part, like too much anxiety on the part of the prosecutor, is sure to operate against what the prosecution invariably calls "the interest of public justice."

§ 106. **The Evidence—Concentrating Attack on Main Defenses of Accused.**—There are two answers only to a charge—one in law, the other in fact. These resolve themselves in practice to three: 1. The prisoner is not the man (mistaken identity); 2. No intention to commit the act. 3. The act was never committed. We are speaking now of the nature of crimes and misdemeanors generally with which advocates have to deal in the police courts; but we are not certain that we should not be perfectly accurate if we applied the statement to the whole of the offenses in the statute book and at common law. It is under one or other of these heads that the various "defenses" will range themselves: insanity, no proof of property, no guilty

that amid the Crown witnesses, interspersed, were witnesses who made some matters deposed to impossible, who undid fastenings and knocked the heads off several of the Government rivets; in fact, who seemed altogether to upset the elaborately constructed evidence of the prosecution. The prosecution became confused, looked at the notes taken down at the institution, compared them with the evidence in court to-day, questioned the witnesses—no use, there were contradictions, irreconcilable disagreements, all in favor of the prisoner. Dates were wrong; prisoner was in two or three places at once. And so it went on, until the judge summed up. The judge did not reconcile the discrepancies—could not, in fact: jury never attempted to. So the man was acquitted. Evidence not sufficient because too much.

knowledge, consent, and so on. This being the case, the first step in arranging and pointing the evidence is to ascertain what can be disputed and what is incapable of denial. A prisoner perhaps cannot deny that he did a certain act. He is either justified then in law, or excused on the ground of insanity, or affirms that he had no guilty knowledge or intent, or that there was consent to what was done. It will be easily perceived where the points of the prosecution will require to be made good. If the prosecution expend the force of its evidence to prove identity when the main defense is no guilty knowledge, or intent to defraud, a rogue may escape from justice for want of mere forensic skill on its part, as he may from a policeman for want of handcuffs.[1]

§ 107. **The Evidence—Taking Advantage of the Defendant's Cross-Examination.**—It is not necessary to repeat what has been said in a former part of this work with reference to the cross-examination for the prisoner. The advocate may be sure that a copious shower of questions from his opponent will rain down some fact or other which will assist the prosecution. He must be a skillful advocate, indeed, who in a long cross-examination elicits no facts against himself, or lets in no evidence which will add a burden to his defense. The prosecuting officer will, therefore, watch

1 A man was once tried for emblezzling money, the price of hay which he had taken from a rick belonging to his employer and sold. There was no proof that he had ever had the money, and if he had, there was no proof that he had received it *for and on account of his master.* It was contended that if it was anything it was stealing the hay. So he was acquitted and charged with stealing the hay. Argued that if it was anything it was embezzling the money, for he had authority to sell the hay. Acquitted. Not because he was not guilty.

every question, and note the answer if it requires to be re-examined upon or commented upon in the summing-up or reply. Men have been convicted through being defended by injudicious advocates, and many a rogue has escaped through the incapacity of the advocate for the prosecution. The greatest lawyer that ever lived might be no advocate, and without a large experience of mankind no man can be a good one. But the young advocate must get experience somewhere; somebody must be the patient for him to practice upon for the benefit of the healthy body corporate. He should, however, learn as far as possible by the blunders of others rather than his own, and will have a fair opportunity of doing so while engaged in a prosecution by carefully watching and noting where a question is clumsy merely, and where it is wrong; by considering how questions should be asked, and, more important still, how they should be *framed,* so as to bring no harm to his case and as much good as possible. Law, only, will not make an advocate any more than a balance-pole will enable one to walk a tight-rope.

§ 108. **The Evidence—How to Break Down a False Alibi.**—We come now to a subject which has always been considered, in criminal cases especially, one of the most difficult tasks that presents itself to the prosecutor. It is that which is known under the title of a *false alibi;* that is, where an *alibi* is set up, and every fact is true except the *date.* It has been said that an *alibi* of this kind cannot be broken down. That is an erroneous idea; and although it is a difficult task, in the majority of cases, it can be accomplished. A false *alibi* may be described in this way: A has committed a burglary, say between the hours of eleven and twelve

on a particular night. B, C and D are resolved to secure his acquittal, and undertake to prove that, at the time mentioned, the prisoner was in their company ten miles away from the scene of the crime. If this be proved, and the witnesses withstand the cross-examination, they will succeed. They know that they will be cross-examined apart as to the main events of their meeting as well as the minor circumstances—the time they started, the road they took, where they stopped, what refreshments they had, how they were employed, and even the relative position each individual occupied with regard to his companions. If the meeting were altogether imaginary, nothing would be more easy than to demolish the whole story. But if A, B, C and D went on some other day for the purpose of subsequently describing their proceedings, each would be able to stand against the most subtle cross-examination that could be administered, as to the circumstances of their meeting. All would be true, and the more they were cross-examined the more clearly the truth would appear. The only thing they would have to make up their minds upon and remember would be that it occurred upon the night of the burglary. This was doubtless an ingenious device, and must have succeeded for a considerable time. It must have been exposed, however, on the first occasion, when it was discovered that the events were all true, and yet the prisoner was guilty. It could be capable of one explanation only. Now comes the question: "How is such an *alibi* to be broken down?" The time-worn questions, such as: "Where were you the day before? The day after?" and so on, are obviously too weak as well as too clumsy to succeed. It cannot be doubted that there must be a way to break down such an *alibi,* but

up to the present time no one seems to have formed any scientific mode of proceeding.

In the first place, it must be ascertained whether the *alibi* be true or false (a very different thing from *proving* it to be one or the other), and this will be easily accomplished by a skillful advocate in three or four questions; for, as spurious metal answers to the test, so a fictitious story will discover its nature to a good cross-examiner. Having satisfied himself on this point, the next question and the only one will be how to break down the witness as to *date*. As all the incidents deposed to actually occurred, cross-examination as to them will be not only a waste of time, but will tend, as before observed, to prove their truth. The cross-examiner must, consequently, proceed to the incidents which are *outside* the witness' story.[1]

[1] If we take an absolutely obvious example by way of illustration, it will probably be more useful than any attempt to define a theory by reasoning. Suppose, then, a burglary to have been committed on the Thursday immediately preceding Good Friday, in a country village, and that the meeting for the purpose of concocting the *alibi* took place on Good Friday. The witnesses will have come prepared to speak of the incidents of that meeting. They will surmise that, in all probability, they will be asked, because it is a common and, as it seems to us, a clumsy question, "Where were you the day before?" and, "When were you with the prisoner before that?" These questions and many others of a similar kind are as familiar to the class of persons now referred to as they are to the counsel asking them. They are obvious, every-day, stereotyped questions, and the witnesses come prepared to answer them accordingly. But suppose the cross-examiner take the witness entirely out of the circumstances, and ask something which he does *not* anticipate. In the first place, he will be afraid to answer, for fear a trap is being laid, and the more the question is unconnected with the circumstances of the case, the greater will be his alarm. Follow that up by another and another alike incomprehensible to his baffled mind, and then ask him where he was *in the morning*. That is quite far enough from the time he has deposed to to set him wondering what it has to do with eleven o'clock at night. As he cannot guess the

§ 109. **Closing Address—Temperate Reply versus "Earnest Appeal."**—We should not think it necessary to say a word as to the reply in a criminal case, but that advocates have sometimes been so vehement both in denunciation and "earnest appeals," that one almost forgets that an unhappy wretch in custody was the occasion of it. Calm and temperate, at all times, should be the voice that asks for the condemnation of a fellow-creature. Every allowance should be made for the common infirmities that beset us; every portion of the case not absolutely covered by the pros-

advocate's meaning, he will be puzzled what answer to return; and, as he will be afraid, on the spur of the moment, to attempt to invent a story, and may not be ingenious enough to do so, he will probably tell the truth. Having got thus far, the cross-examiner starts with a *fact*. By the same process he may get another and another fact. The witness will be drawn on to give him facts, because he does not know what answers his companions may give. He will feel sure that the cross-examiner will put the same questions to them. Presently, the advocate may get from him, if a little caution and skill be used, what people he met, and where and at what time—what they did and where they went. He has not come, by any means, prepared to set up a dozen *alibis* at once—some for himself and some for his friends—so, he must necessarily become confused, and, as he will tell the truth and lie at the same time, the cross-examiner will find him pretty much at his mercy. It may be that he saw several people on that morning, and he may place so many of them together, by a little gentle humoring, that the cross-examiner may, at least, safely put the question, "Were not the people coming out of church?" Outwitted, the rogue will smile and say, "No, *it was Thursday!*" but the effect of this, if done with tact, will utterly destroy the whole story. The jury will readily accept the suggestion—which, indeed, the advocate may be able to prove by independent testimony—that *the day he is speaking of must, from the incidents drawn from the witness, have been Good Friday, and not the preceding Thursday.*

But the cross-examiner will not rest there: at present he has only gone a little portion of the way. The next witness will fall into the same blunder, and may add another minute fact to the particles of evidence. Suppose Thursday was a fine, and Friday a wet day.

ecution should be left unmolested if, haply, his trembling foot may find a resting-place thereon; and nothing should be asked of the jury except the exercise of impartial judgment upon the facts before them.

Here is a field for the exercise of ingenuity which counsel should hail with delight; and he ought not to sit down till he has proved from the witness that the day he and his companions were together was a *wet day*. Of course, the advocate will not be able to elicit this by direct questions or in so many words; but answers do not always consist in words, they are frequently conveyed unwillingly by manner and demeanor: are given when there is no intention to give them, and when the witness is utterly ignorant of their effect. And the effect will be the same, if the advocate's examination be skillful, as though the witness answered him in actual words. The advocate would not be weak enough to let him suspect that he was cross-examining for a rainy day, otherwise he would fail: it is only by keeping the witness in the dark that he can succeed. The witness' mind will be working intensely the whole time he is being cross-questioned, and, as his great object will be to find out what the cross-questioner is aiming at, the latert's purpose must be to conceal it.

If the advocate succeed in getting from these two witnesses an incident, however small, that even *tends* to show that the meeting took place on Friday, he will have almost demolished the *alibi*. But C comes into the box and may, by a stretch of memory, recollect for whom he worked at the time and what particular work he was engaged upon; and it might possibly have happened that some part of the machinery broke on that particular morning. Nothing outside the case is too trivial if it throw but the faintest gleam upon it. If he answers flippantly he will be caught in two or three questions without much difficulty. If he answers overcautiously he will betray himself by his demeanor, and the advocate may follow him up and give him line like a pike that has taken the bait. But if no work was done and no machinery broken, the advocate will still be able to find out his *habits*, his *mode of living* and his surroundings; and it will be strange if, from all these, the cross-examiner do not lay hold of some event which will be shown by its connection with some other event to have happened on the latter and not the former of the days in question. *The smallest incident may be linked to a greater, which may be either patent of itself or notorious as to the day of the week on which it took place* Other witnesses may be dealt with in like manner, *none of them being cross-examined as to the same facts unless for the purpose of contradiction*, but all of them questioned as to incidents which, small though they be, will, in their united strength, destroy the *alibi* altogether.

CHAPTER XI.

CONDUCT OF A DEFENSE IN A CRIMINAL TRIAL.

§110. The Young Lawyer Before the Police Magistrate.
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121. Closing Address for the Defense—Calling Attention to Absence of Motive on Part of Accused.
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123. Closing Address for the Defense — Explaining Away Difficult and Awkward Points in the Evidence.
124. Closing Address for the Defense — Emphasizing Good Character of Accused.
125. Closing Address for the Defense—General Considerations.

§ 110. **The Young Lawyer Before the Police Magistrate.**—As inexperienced advocates are frequently before the magistrates in their professional capacity, it may not be without advantage to make a few observations on the conduct of a case in those courts. The mode in which persons charged with crime are defend-

ed at the police court has often appeared to many people as a kind of preliminary retribution to that which is to come. A young advocate, who has had nothing of a more serious nature to defend than a charge of drunkenness or assault, is suddenly called upon to *pose* before the public, in a case of willful murder or some other offense, where a committal is absolutely certain. How is he to do justice to his client? There is only one way, and that is to hold his tongue. One would think advocacy the easiest thing in the world, requiring neither training, knowledge, nor experience, to see how perfectly ready the young advocate is to step into the arena and do battle in the interests of the accused; as if an advocate were made by being called to the bar or admitted on the roll of attorneys. One might just as well expect the indentures of an apprentice to impart a knowledge of his handicraft.

When a young lawyer has been instructed to defend a case of murder or other serious offense before a committing magistrate the best thing he can do is to preserve an unbroken silence. Otherwise he is almost sure to do mischief; and the worst mischief is that he will most likely tie up the hands of the counsel engaged to defend before the ultimate tribunal. It may be desirable to have a fact or two upon the depositions, but if so, it will require an advocate of some experience to ascertain what those facts shall be. The greatest discretion should be used as to whether a question should be asked or not. With a very few exceptions, no cross-examination should be administered when the case is to go for trial. Instead of this course being pursued, a long cross-examination is often indulged in, or the young gentleman who thinks he is defending puts as many questions as he can, under

the impression that questioning is cross-examination, and then answers are elicited detrimental if not destructive to every chance of acquittal. For the purpose of convicting unfortunate wretches who are charged with offenses, the state need not establish public prosecutors while young advocates defend, for these gentlemen can administer questions which the law forbids the prosecuting counsel to ask; and what is more, they can *privately* question the prisoner, and then by giving the information so obtained in the shape of questions to the witnesses may display a knowledge of circumstances only consistent with the prisoner's guilt, as by showing that he was present at the scene of the crime, when probably the defense is to be an *alibi!*

§ 111. **How far Defense Should Show Its Hand Before Committing Magistrate.**—There may, nevertheless, be cases where it is possible to avoid a committal by bringing all the facts before the magistrate. And this may be done sometimes even in the most serious charges. But no inexperienced advocate should be intrusted to *defend* under such circumstances.[1]

1 This was successfully done some time since in a case in England which attracted considerable attention from its remarkable peculiarities. A woman had been murdered in a very shocking manner in a house of ill-fame near Oxford street, London. The police, as is customary, obtained the all-important clew, and it was therefore necessary to obtain a prisoner. They followed it up with that remarkable intelligence which always characterizes the "Force" in heavy cases; and losing the clew for a moment on board a vessel which was outward bound, found it again almost immediately in the very spot where they had missed it. Instead, however, of arresting the man they were after, "from information received," they pounced upon an inoffensive and mild-looking clergyman and charged him with willful murder. Witnesses were soon obtained (the supply in London always being equal to the demand, whatever may be the commodity you require), who saw the reverend gentleman leave

Many cases there are where a judicious examination in the first instance before the magistrate would insure the discharge of the accused, but in all these cases an advocate of some experience should be retained. It may be taken as a good rule that where a case is going for trial no defense should be raised. It should be carefully watched, and a question here and there judiciously interposed where something is *certain* to be obtained favorable to the accused. Where the answer is doubtful it should never be risked. Severe cross-examinations and magnificent police-court speeches can only be useful to the prosecution.

If, however, the case of the accused rests upon his calling witnesses, this will necessitate their being before the magistrate, otherwise it will operate to the prejudice of the defense at the trial. The prisoner, moreover, if they are "bound over," will have the advantage of their expenses being provided for if the judge considers their evidence material and trustworthy. But if called it is only necessary to give the outline of their evidence, a full outline it may be, but the details should be judiciously reserved. It is a good plan sometimes to have witnesses before the magistrate and not call them if you can avoid it. It takes

the brothel where the deceased woman was found immediately after. The singular part of the story was, that he so exactly corresponded with the man whom they did *not see* leave the house and whom the police were in quest of when they boarded the vessel. Of course it was of the utmost importance that this gentleman should not be committed for trial, although a conviction would have been utterly impossible. It was consequently necessary to cross-examine the witnesses and to call evidence. This was accordingly done, and it was clearly established that the reverend prisoner was perfectly innocent of the charge; that he was elsewhere at the time he was said to have been in the street; and that no single circumstance in regard to his conduct required explanation.

the sting from the question, "Were you before the magistrate?" or "When were you asked to give evidence?" This is very often, as Brougham would say, "*expedient.*"

§ 112. **How to Deal with a Defective Indictment.**—Let it now be assumed that the prisoner has been duly committed for trial, and that a "True Bill" has been found by the grand jury. It is the first business of the counsel instructed to defend to see what charges the indictment contains. This duty is more often than not neglected by junior barristers, and the consequence sometimes is that a prisoner is convicted on a bad indictment. It contains, perhaps, no offense known to the law, or it contains too many offenses; something is not set out which should be, or there may be a great deal too much set out. There may in short be some "flaw" which, if taken advantage of in a proper manner, would insure the acquittal of the accused. This is by no means of such rare occurrence, notwithstanding the powers of amendment and the improved methods of pleading, as to make it a matter of little moment to examine minutely the indictment.

Referring now to advocates who are good lawyers, when they have carefully and critically perused the indictment, they probably know exactly what it contains, and will therefore not move without strong necessity to have it quashed—as this is by no means a safe proceeding. Indeed, the advocate should under such circumstances give no opportunity of amending, where by taking objection at the proper time, he will compel his opponent to "elect" as to which of the counts he will proceed upon; and that he should not prematurely take an objection where he should reserve

his attack for the forlorn hope of a motion in arrest of judgment.

§ 113. **What and How Many Defenses to Make.**—These points having been carefully considered, and the advocate having thoroughly made up his mind as to *what* the defense is to be, remembering always that one good defense is better than two, he must now watch carefully the opening of the case for the prosecution. If his adversary open too much it will be a point in his favor. "A guilty man," says Whately, "may often escape by having too much laid to his charge; so he may by having too much evidence against him, *i. e.,* some that is not itself satisfactory; thus a prisoner may sometimes obtain an acquittal by showing that one of the witnesses against him is an infamous informer and spy, though perhaps if that part of the evidence had been omitted the rest would have been sufficient for conviction."[1]

§ 114. **Opening Statement of Counsel for Defendant.**—The opening statement of counsel for defense may be made immediately after that for the prosecution, or, in the discretion of the court, after the close of the evidence for the prosecution. It is conceded that in the great majority of cases the opening statement of the defense comes with greater effect after the state has closed its case than before, for the reason that the facts then stated, as intended to be proved, offer an explanation of the facts already proven, and thus, in a measure, change the view-point of the jury to one more favorable to defendant.

The opening address of counsel for defendant, especially if made after the close of the case for the

[1] Whately's Elements of Logic, B. III, Sec. 18.

prosecution, should be, above all things, conciliatory. The time for vociferation and bold argument, if at all, is in the closing speech. The object of the opening statement should be merely to draw the minds of the jury into a favorable attitude toward the defendant and the introduction of his evidence in his favor; to arouse their sympathy and to gain their confidence.

In harmony with the general tendency of our laws to favor the defendant, few restrictions are placed upon counsel for the defendant in his opening statement. The trial court, however, always properly restricts him from stating matters which would be inadmissible in evidence.[1]

§ 115. **Methods of Objection to Evidence.**—Again, if the prosecution inadvertently open a case differing materially from the evidence of witnesses, or any of them, it will be a matter of observation which will not be without its effect. It is not the business of the defendant's counsel to object; he does not know what the prosecution can prove, and if the latter's proof fall short, so much the better for his client. But he must narrowly watch *and* object if counsel for the prosecution propose to read any letter or document, or state any conversation which, when the proper time comes,

[1] Meyer v. State (Tex. Cr. App.), 41 S. W. Rep. 632. In this case, which was a trial of a defendant for assault upon his wife, defendant's counsel was permitted in his opening statement to comment on his wife's appearance on the witness stand, and her manner of testifying, so far as the same might tend to affect her credibility. But it was held that it was not error to refuse to permit him to also state to the jury that it was shown by her appearance, disposition, "the looks of her eyes, her conduct, her demeanor, and manner of testifying, that she is not a woman of private or domestic habits, but a woman of worldly experience, of heartless feelings, devoid of modesty, and of reckless and adventurous character."

may not be admissible. It is useless after the mischief has been done and the impression made on the minds of the jury, for the judge to say, "I shall tell the jury that that document or that conversation is not evidence, and they are to dismiss it from their minds." They cannot dismiss it from their minds, and it *is* evidence, no matter whether called so or not, when once before them, and will in all human probability have an influence on their judgment. It is like the village lawyer telling the man that they could not put him in the stocks; the irrefutable answer, "But I *am* here." The defendant's lawyer must further take care that if he succeed in shutting out a document he exclude also all observations upon it, for nothing is more unfair than to allude to matter which is not in evidence; although it is often inadvertently done.

While the advocate exercises the utmost vigilance to prevent the admission of matter which is not evidence, care should be taken not to object to every question on that account, or because it may be put in a leading form or in a form that may be otherwise objectionable. Too many objections have the bad effect of wasting time and of raising an unjust suspicion in the mind of the jury.

That the defendant's attorney should preserve the most even and calm demeanor in conducting a criminal defense it is hardly necessary to observe. It is, indeed, a part, and no unimportant part, of his case. Irritation and querulousness are bad accompaniments of the best defense; and if he win, it will be in spite of them, and not by their assistance. Let the worst be stated against him, but, if possible, he should not let the worst be proved. This must be his object in following closely the witnesses for the prosecution.

§ 116. **Emphasizing Mistakes of Inaccurate Witnesses.**—The defendant's attorney must be careful to note the points of difference between the witnesses as well as the points of agreement. For observe: They may agree on some point in his favor and disagree as to something which is against him, and indeed, any disagreement may be turned to advantage. With a little experience and a good deal of observation he will be able to distinguish between those matters of detail which sometimes betray perjured testimony, and details which are of no importance whatever; as also to distinguish between mere inaccuracies in the evidence, arising from a slovenly habit of thought, and inaccuracies which are artfully contrived to deceive. Inaccurate witnesses, when properly cross-examined, will often destroy the effect of the most accurate, as they will raise a doubt where none would otherwise exist. Inaccuracies, therefore, as to date, time, place, position of the parties, what was said, by whom, and other matters of a like kind, ought not to be overlooked, due regard being had to what was before observed as to mere discrepancies.

§ 117. **Cross-Examination by the Defense—General Rules.**—In cross-examination the utmost care should be exercised otherwise the facts, instead of being toned down, will stand out the more clearly. The danger is so great to the unfortunate object whose fate may be determined by an injudicious question, that the advocate had better not cross-examine at all if he has not perfect confidence in the line he is taking, and that the answers will not endanger his liberty of life. If the advocate don't know what to ask, ask nothing.[1]

[1] "I do not think," says Mr. Harris, "that any advocate, however clever he may be, should take upon himself a defense of any import-

The best preparation a man can have to qualify himself to cross-examine is to study carefully the mode in which the best men proceed, and to acquire a knowledge of character, of human nature, of what is called "the world." One man may have a greater aptitude than another, but with the most gifted it requires years of training and observation to arrive at anything like perfection. With the ordinary individual, therefore, too much study cannot be given to acquiring sound knowledge of the art. While his cross-examination is proceeding, the counsel for the prosecution will watch for supplemental evidence, or for an opening through which he may drag some in. Frequently, he would have few materials to ask a verdict upon without this so-called examination, and that being so, the defendant's attorney should *ask as little as he possibly can*. If he cannot serve his client he should avoid injuring him. Of course, the greater his ability and the more knowledge he acquires, the more he will be able to accomplish with the fewest questions.

§ 118. **Cross-Examination by the Defense—"Drawing Out" an Opposing Witness.**—At the commencement it is a good plan to throw out one or two trifling and harmless questions in order to ascertain the temper and feeling of the witness. It will tend also to put him on good terms with the advocate, if there be

ance till he has had some experience. No man without it can cross-examine unless at great risk. He may ask questions and get answers, but he will be a wonderfully fortunate man if he do not inflict more damage upon his client than upon the witness. It has often occurred that after a spirited cross-examination by a young advocate, he has made the observation, 'I think I have settled him haven't I?' In the civility of my heart I have answered, 'Yes, *I think you have*.' At the same time, I have no doubt we were speaking of two very different persons, he referring to the witness and I to his unfortunate client."

a necessity for it. He may have been brought into court against his will and obliged to say what he has said; but with mild encouragement and a little gentle leading he will probably follow you with the docility of a friendly witness. He may know a great deal more than he has said, and what he knows may throw much light on what has gone before. He may be a well-disposed witness, after all, and inclined to give a different color to the case. Everyone knows how much a little coloring changes the appearance of a bare wall; so it does the aspect of a *bare fact*. But if the advocate commence by treating the witness in a hostile spirit, as though, being a witness for the prosecution, he must necessarily be adverse in feeling to the prisoner, he will lose the benefit of all the kind things he may be able to say in his behalf.

§ 119. **Cross-Examination by the Defense—How to Handle Hostile Witnesses.**—If, on the other hand, the advocate perceive that the witness has a strong feeling in the matter, the less he has to do with him the better. He will drive every nail home which the prosecution may not have struck forcibly enough. Ask him one question: he will answer as if he had been asked half a dozen, and every answer will be unfavorable. The cross-examiner might as well butt the witness-box with his head (and better, for his client's sake) as question a witness of this kind. If he should get anything favorable it will be by accident, and because the witness does not perceive the drift of the question. Everything the advocate asks gives him the opportunity for a speech against the prisoner. If the advocate *can show the witness' strong feeling* by a well-conceived question or two, it is all he ought to attempt with a witness of this kind, unless, indeed he

can *convict him of an untruth.* These are his only chances with such a witness.

But many hostile witnesses may be treated in a different manner, according to their degrees of hostility and their temperament. The advocate may sometimes destroy the effect of the evidence of an adverse witness by making him appear more hostile than he really is. He may make him exaggerate or unsay something and say it again. If he cannot pull him off his high-horse on one side he may perhaps push him over on the other; and, so long as he get him off, it does not much matter on which side he lands him. Perhaps the witness will show himself *spiteful*, and lose his temper at the same time; if so, it will be in the advocate's favor, for juries dislike, above all things, to see spite in the witness-box.

§ 120. **Whether or Not Witnesses Should Be Called or Case Submitted on State's Evidence.**—Having completed his duty in the above respect, the advocate will not be indiscreet enough to "submit to the court that there is no evidence to go to the jury," if there be some; but will consider whether he will call witnesses, if he should not have made up his mind at an earlier stage of the case. If the evidence against him be weak, and his own not strong, he ought not to call any. By doing so he will lose the last word, and, what is perhaps of far greater importance, *run the risk of strengthening the case against him on the cross-examination by the counsel for the prosecution.* This has often been done to the ruin of the accused.

If at length the advocate find that he ought to call witnesses, he should avoid calling too many; or rather too many to the same subject-matter. One good witness is worth a dozen indifferent ones, and it is much

easier to get contradictions from a dozen than from two or three. The advocate should remember, too, that a contradiction in his witnesses will be a much more serious affair than a contradiction among those of the other side; for, though the law presumes every man innocent until he be proved guilty, the jury presumes every man on his trial to be guilty until the evidence fails to convict him. They will look in most cases with some suspicion upon the evidence for the defense, and every weak point in it will be magnified accordingly. In most cases the witnesses for a prisoner either save or convict him. If they are good witnesses and honest, they are of inestimable importance, but if they are shady, they will almost always be shaky, and infinitely worse than none at all.

§ 121. **Closing Address for the Defense—Calling Attention to Absence of Motive on Part of Accused.**— But whether the advocate call them or not, he will at last come to that very important part of his duty, namely, his speech on behalf of his client. The advocate will now in the pleasantest manner but with due gravity commence his defense, and if the accused be a person of character, especially if he occupy any position in the social scale, he will do so by bringing those facts prominently before the jury. Nothing is more calculated to engage their attention and enlist their sympathies than this, besides which the advocate excites as well as gratifies their curiosity. This feeling is akin to surprise, and nothing takes a firmer hold of the attention. At the same time he will almost have excited the *hopes* of the jury on behalf of the accused. The prosecutor will have passed from their minds and a new object presented itself, namely, that of a respectable, well-educated man in the dock. Im-

agination deepens the disgrace and awakens still tenderer sympathies on his behalf. They will be sure to think, without any reminder on the advocate's part, of those belonging to him, and of the hearts that beat in unison with his own. This is a part which should not be hurried but given time to play. Now the advocate should bring forward the charge; if it be one of enormous guilt, or of a mean and despicable kind, or one revolting to humanity, what a contrast is produced between the character and the crime! There is an inherent improbability against such a man committing such an offense! That is a good contrast to start with. And, here again, the advocate should be careful not to hurry the jury away from so good a situation in the drama. If he has performed this part of his defense with art and skill he has already prepared the mind for the impressions that are to come. A little lingering around the scene, without too much to say, only to give time before he addresses himself to argument, will be beneficial. Let them just have time to contemplate the scene and take in its misery.

Connected with the improbabilities will be, possibly, absence of motive. If so, the subject comes in naturally at this point. If a motive has been suggested it must be grappled with and should be as soon as possible; if not, it is a happy circumstance to be commented upon briefly but with fervor.

§ 122. **Closing Address for the Defense—Calling Attention to Motive of Prosecuting Witness.**—Perhaps the advocate will discover some motive for the prosecution apart from the divine "interests of justice;" if so, that is a kind of torpedo which, when he explodes it, will blow the honest prosecutor out of the water. Having reached this point, now will be the time for a

display of his powers of declamation. So he may prepare to use them without delay, for he has Innocence in the dock and Guilt in the witness-box! Such, at least, in the eyes of the jury, is the last situation in the drama. And here he may resume his seat while the curtain is dropped. If any one thinks this picture exaggerated or overdrawn, the only answer is that it is from life. Many an eloquent advocate past and present has accomplished all that has been said by the same or similar means. And whenever the advocate reaches a point in a defense where the minds of the jury are wavering, and where he can honestly excite a prejudice against the prosecutor or his witnesses, a few heart-warm sentences of well-timed declamation are all that is necessary to demolish the case for the prosecution. Declamation, judiciously employed, is like cavalry in battle, dashing in just as the enemy is on the point of yielding and sweeping him from the field.[1]

[1] William Howitt, in speaking of Erskine as an advocate, says: "Lord Erskine has been pronounced by other distinguished lawyers the greatest forensic orator that England has ever produced, but his fiery and electric eloquence was not more remarkable than the warm and noble impulses of his heart. They were his humanity and patriotism, his indignation against whatever was unjust and oppressive, which kindled and inspired his great intellect, and *their expression carried irresistibly the souls of his hearers along with him.* Under the fervid outgush of his intense love of right, his vehement hatred of human wrong, the dullest hearts caught a new life and fire, and he drew verdicts from men who, without his communicated spirit, would have never dreamed of the sublime heights of truth and justice to which he carried them. The secret of his triumphs was the possession of a noble heart vivifying a quick and instinct-like intellect. He seemed to spring at once to the truth of the case submitted to him, and he hurried his hearers with him almost unconsciously to the same goal. It is rare to see a mind like Erskine's surviving all the cold cautions and technical sophistries of a legal education, and seeking its triumphs only in the triumphs

§ 123. **Closing Address for the Defense—Explaining Away Difficult and Awkward Points in the Evidence.** —The jury will follow the advocate sentence by sentence and word for word, and the stronger his arguments the more intently they listen. If now he can point out how they may acquit consistently with their oaths, they will feel inclined to do so. If he can explain away satisfactorily one or two awkward points in the evidence, the verdict will be his. It has reduced itself to this already. Without the employment of any clap-trap he has gone a long way on the road. He has reached the feelings of the jury and they *wish* to acquit. Now, it is the advocate's duty to show how it can be done. He should bring up the evidence for the prosecution, not like a tender delicate creature, to be nurtured as it was by the counsel on the other side, but like a hideous thing to be looked at and put away out of sight. What is this evidence? Can he proceed to show that it is not consistent as a truthful story should be, but a patchwork performance of many pieces and many colors, a thing of no pattern? If so, it begins to lose its hold upon the jury; the improbabilities thicken and strengthen; there is increasing sympathy for the accused as each juryman begins to think he may be the victim of a terrible mistake, or worse, of a horrible conspiracy! Encourage that feeling, not by saying that it is so, but by leading their minds to form the conclusion for themselves.[1]

of humanity; a mind unseduced by royal favor or party, much less by selfish individual interests; exulting in securing the victory of truth, even at the highest peril of self-sacrifice. Such men may have their weaknesses, as Erskine had his, but they have a strength to which no mere intellect or learning can ever reach. For this reason there is no life of any lawyer which I ever read with the same delight as I have read that of Thomas Erskine."

[1] Surely such a charge should, if made, be supported by conclu-

§ 124. **Closing Address for the Defense—Emphasizing Good Character of Accused.**—If the advocate has called witnesses, of course his obvious duty will be to point out the contrast between their evidence and that of the witnesses for the prosecution, as well as the fact of its being more compatible with the character of the accused. He will perceive that character stands prominently forward again and again without any ostentatious display. It should not be used as though in so many words he asked the jury to acquit because the prisoner bore a good character; it is of great weight where probabilities are balanced and circumstances are doubtful—where they may receive a construction either favorable or unfavorable to the person charged. It should play its part like the principal character in a drama, appearing always at the right time and in the appropriate scene. It is the one thing that has saved many a rogue from his well-deserved doom; but it has also saved many an honest man, unjustly charged, from ruin and many a family from misery and degradation. If the advocate has this ally, the enemy must be strong who defeats him. Of course, there are cases where character does not and cannot

sive and unimpeachable evidence. not such as is open to the observations you are making; not by evidence every part of which seems to be giving way under examination. And can you not point out how a man with an estimable character should not be destroyed by witnesses without any character at all? If there be one such among the witnesses for the prosecution, it will answer your purpose. It may be the prosecutor is a rapacious money-lender and the accused a man who borrows. The prosecutor may be a wrecker of homes and the prisoner a man whose home is wrecked, and who is prosecuted for obtaining money by some false pretense upon a bill of sale. Accuser and accused may thus be brought into contrast until, at last, the one will be looked upon with contempt and the other with compassion.

avail, however excellent it may be; but there are so many where it is of inestimable importance that it cannot be out of place to insist upon it as though there were hardly an exception.

§ 125. **Closing Address for the Defense—General Considerations.**—One of the most seductive temptations to an advocate in making the closing address to the jury for the defendant is to wander from the point at issue and go skylarking into the ethereal realms of glittering generalities, charming the jury, and, incidentally, the galleries by his beautiful word imagery and his rhythmic and resounding rhetoric. The spell created by such eloquence, if we may be pardoned the sacrilege of using that word in this connection, is momentary; it is gone ere the echoes of the speaker's voice have hushed. It matters not how much of oratory and word imagery is present if they spring up and flower naturally from the sound arguments and the deep earnestness of the speaker; otherwise they are as sounding brass and tinkling cymbal.[1]

In many cases the advocate for the defense should get into the jury box and become one of the jury. That

1 Dr. Hall said: "If I were upon trial for my life, and my advocate should amuse the jury with tropes and figures, burying his argument beneath a profusion of tropes and figures, I would say to him: 'Tut, man, you care more for your vanity than for my hanging. Put yourself in my place; speak in view of the gallows and you will tell your story plainly and earnestly.' I have no objection to a lady's winding a sword with ribbons and studding it with roses when she presents it to her lover, but in the day of battle he will tear away the ornaments and present the naked edge of the blade to the enemy."

Another learned critic says: "The reason and judgment reject the unsubstantial and airy creations of an unfettered imagination. They demand that chaste thought, and not unadorned diction, in which the *cause itself* may be said to speak, and the speaker is comparatively silent."

is to say, he should confer with them over the case in a calm, earnest manner. Our own opinion is that this method of speaking follows with more force after a stirring appeal has been made to the emotions of the jury. Indeed, it is more successful as a closing appeal than a glittering and resounding peroration.[1]

[1] Of Lord Abinger (Mr. Scarlett) it was said that a juror, who had given him many verdicts, on being asked what he thought of the different leaders, said: "Well, that lawyer Brougham be a wonderful man; he can talk, he can; but I don't think nothing of Lawyer Scarlett." "Indeed," replied his interrogator, "you surprise me. Why, you have been giving him all the verdicts!" "Oh, there's nothing in that," said the juror, "he be so lucky, you see; he's always on the right side." David Paul Brown said of this great advocate: "In addressing a jury he seemed rather to argue his case with them than to them, and, in the language of one of his competitors, he virtually got into the jury-box and took part, as it were, in the decision of his own case."

CHAPTER XII.

CLASSES OF WITNESSES.

§126. The Lying Witness.
127. The Flippant Witness.
128. The Dogged Witness.
129. The Hesitating Witness.
130. The Nervous Witness.
131. The Cunning Witness.
132. The Witness Partly True and Partly False.
133. The Stupid Witness.
134. The Semi-Professional Witness.
§135. The Official Witness.
136. The Policeman as a Witness.
137. The Truthful Witness.
138. The Convict as a Witness.
139. The Private Detective as a Witness.
140. The Handwriting Expert as a Witness.
141. The Medical Witness.
142. The Vanity of Witnesses.

§ 126. **The Lying Witness.**—A witness whose evidence is untrue must lie with wonderful skill if he go through even his examination in chief without betraying himself. He is the easiest of all to dispose of, and once discovered to the jury in his true character, will do more harm to a cause than half a dozen truthful witnesses will undo. In most cases, if the cross-examiner has had any experience, he will be able to refute the statements of the witness by his own lips.

The witness comes up with a well-concocted story, and tells it glibly enough. Now, it is well known that events in this world take place in connection with or in relation to other events. An isolated event is impossible. The story the witness tells is made up of facts which, if true, fit in with a great many other

facts, and could not have happened without causing other facts or influencing them. If his story be untrue, the matters he speaks of will not fit in with surrounding circumstances in all their details, however skillful the arrangement may be.

In cross-examining such a witness, or a witness who lies, the advocate must therefore apply the test of surrounding circumstances, and compare his testimony with that of other witnesses. The latter will be the severest and the surest test if the cross-examiner apply it to the smaller details. It need hardly be said that, the greater the number of witnesses to prove a concocted story, the greater the certainty of exposure by a skillful cross-examiner. The main facts of a story may be so contrived as to be spoken to by all the witnesses; but they cannot agree upon details which never occurred to them, or concoct answers to questions which they have no conception of. But even in this mode of cross examination the advocate must be careful not to obtain an apparent corroboration where he seeks contradiction. The way to avoid this is *not to put the same question upon some important piece of evidence to every witness.* If the cross-examiner has gotten the first contracted by the second, he should let the matter rest; the next witness may make a guess and corroborate the first, which will materially weaken the effect of the contradiction.[1]

[1] It was the great complaint of Brougham, in Queen Caroline's trial, that the story was so well concocted that two witnesses were never called upon one important fact. This, of course, was contrived so that there should be no possibility of contradiction. It is not difficult, if there are several witnesses telling an untrue story, to break them down in cross-examination; and one of the best instances is that narrated in the story of Susannah and the elders. This example of cross-examination further shows how necessary it is that

It is when the cross-examiner has to deal with an untruthful witness who speaks only to one set of facts, and stands alone with regard to that evidence, that his skill is put to the test. How is he to shake his testimony? Assuming that character is not altogether out of the question, he will first ascertain who he is, and upon this point he may not be touched. If the witness is a man of bad character (that he has been convicted, say) the advocate's task will be comparatively easy. He may so unskillfully put his question as to evoke sympathy on behalf of the witness instead of contempt; whereas, if his questions are well asked he may not only show that he is not to be believed on account of his previous character, but also on the ground that his mode of answering condemns him as a false witness. If the cross-examiner shows at once that he knows all about him, he will see that it is useless to attempt to deceive him, and out will come the answer, probably in a pathetic tone: "Unfortunately I have been convicted, but what has that to do with the case? Am I always to be told of it?" This will enlist the sympathy of the jury at once. If, however, from the mode of putting the question, the witness thinks the cross-examiner has some doubt, he will take a different line, and although the mode of cross-examination may have led him first into a denial and then

the other witnesses should "be out of court" while one is under examination. "For bringing to light the falsehood of a witness," says Whately, "really believed to be mendacious, the more suitable, or rather the only suitable course, is to forbear to express the impression he has inspired. Supposing his tale clear of suspicion, the witness runs on his course with fluency till he is entangled in some inextricable contradiction at variance with other parts of his own story, or with facts notorious in themselves, or established by proofs from other sources."

driven him into an admission, the fault will be his and not the advocate's. He should have told the truth at the onset.[1]

If the advocate know nothing as to character he must proceed to test him by surrounding circumstances, leading the witness on and on, until, encouraged by his apparent success, he will soon tell more than he can reconcile, either with fact or with the imagination of the jury.[2]

A mile with him will become three if he be led to think the object is to make it less. Darkness will become "light as day," and the moon will shine with the utmost splendor when, according to the almanac, she is nowhere. It is impossible to tell how far the down-

1 If an advocate ask such a witness how many times he has been convicted, he will not deny having been convicted, but will answer: "I don't know." If, however, he asks him if he has ever been in trouble, he will hesitate, and say, "No," and then "Once," thinking the cross-examiner is only acquainted with his last escapade.

2 At a trial at Warwick some years ago a remarkably well-planned *alibi* was set up. The charge against the prisoner was burglary. An Irish witness was called for the defense, and stated that at the time the burglary was committed the prisoner was with him and four or five other persons some miles from the scene of the crime. The time, of course, was a material element in the case, and the witness was asked how he fixed the *exact* time. He said there was a clock in the room where he and the prisoner were, and that he looked at it when they went in and when they left. He was then told to look at the clock in court and say what time it was. The witness stared vacantly for a considerable time, and then said it was "such a rum 'un he couldn't tell."

"Can't you tell a clock?"

"Shure, sor, I can't tell that un!"

What was still more strange, the same question was put to every witness, and there was only one out of some six persons who could tell what o'clock it was. And yet they all swore to the exact time deposed to by the first witness and repeated the answer as to how they knew it. Of course the *alibi* totally broke down, and the prisoner was convicted.

right liar will go if only given a little encouragement. Let him exaggerate and color to the full extent of his inclination or imagination, and when he has completed the picture every one will see that it is a monstrosity; in other words, no one will believe a word he says. "A liar is not to be believed even when he speaks the truth." It is an old saying, but will never be so old as to be worthless.

But the advocate may get an actor in the box, who for a long time will conceal his true character. He may be a man who has a spite against the plaintiff, the defendant, or the prisoner, as the case may be. Or, if none against the parties to the action, he *may have a very strong feeling against some person interested in the result of the case.* This must be ascertained. It is the very point which he will conceal if he can, but it is also the very one that must be found out and exposed. It will probably be detected during the examination in chief, if the advocate be vigilant; if not, it must be ascertained in cross-examination.[1]

[1] The advocate must bear in mind, while on this subject, that if he wants to read a man's real character, he must look at his mouth; all the other features may, to a certain extent, be controlled; but the mouth never can be sufficiently to conceal the emotions from a quick observer. All the passions manifest themselves upon and about the lips; and if the witness be suddenly and somewhat sharply questioned upon the subject that is most strongly operating upon his feelings and inducing his evidence, an involuntary motion of the mouth will be perceived, which will instantly betray him. A beard even cannot altogether hide this wonderful index of the mind. So if a witness' attention is directed to those facts in connection with a case which are suspected to have strongly roused his feelings against the plaintiff, defendant, or any other person interested in the proceedings, the advocate will gather from the involuntary expression of his features whether he is correct in his surmise; and what is of still greater importance, the jury will perceive it as well, after the cross-examiner has followed up his question by another and another, for ultimately concealment will be impossible. This is part

It might be here observed, that *whenever the cross-examiner has once fairly caught his witness, he should not sacrifice the advantage by exhibiting him too ostentatiously.* Having obtained the answer wanted, keep it, and at once go off upon another point; otherwise, on repetition, the witness will qualify what he has said, and very likely unsay it altogether by some lying explanation.[1]

§ 127. **The Flippant Witness.**—When a witness comes into the box with what is commonly called a "knowing" look, and with a determined pose of the head, as though he would say, "Now, then, Mr. Counselor, I'm your man, tackle me," the advocate may be sure he has a *flippant* and masterful being to deal with. He has come determined to answer concisely and sharply; means to say "no" and "yes," and no more; always to be accompanied with a lateral nod, as much as to say, "Take that." But although the masculine pronoun has been used, this witness is very often a female. She has come to show herself off before her friends; she told them last night how she would do it, and feels quite equal to "any counselor as ever wore a wig." I have seen many a counsel put down by such a witness; a sharp answer, with a spice of wit in it, has turned the young advocate into a blushing boy and utterly discomfited him. Perhaps a laugh has

of what is called "the demeanor of a witness," so often spoken of as of such inestimable importance as one of the test of a witness' truth or character, so highly appreciated and yet so little understood in its more subtle significance.

[1] A common liar of this kind, who lies without art, is simply to be dealt with as the woodman splits up a log; find a crack, be it ever so small, place in the wedge and drive it home, *but never put the wedge across the grain.*

been caused by some impertinent observation. The best advice under these circumstances is, first of all, for the advocate to make up his mind not to be put down. He must preserve the most placid and unruffled demeanor, and above all things, *never reply upon the witness.* To be led into a retort, unless it were an absolutely crushing one, would betray a weakness and show that the witness was making the running. To argue with a witness is not only to abandon the cross-examiner's high post of vantage, but to make a bad impression on the jury.

In dealing with this witness, an advocate should carefully abstain from administering rebukes, or attempting "to put the witness down." His object should be to keep her up as much as possible, to encourage that fine frenzied exuberance, which by and by will most surely damage the case she has come to serve. A little encouragement would be of more service than anything that would tend to dampen the ardor of this flippant fury. Besides, the advocate has opportunity of animadverting upon her evidence by and by, and is then enabled to show by the contrast of a quiet manner with her blatant and irrepressible demeanor how utterly worthless her evidence is. The good effect which any portion of it may have produced will share the condign fate of the remainder.[1]

[1] An endeavor will be made to point out the mode of putting a question in such a case. The cross-examiner should always approach the witness as if she were a wild animal ready to tear him if she should get near enough. Therefore, he must circumvent. The cross-examiner may be sure she will never give an answer that she supposes may be favorable. This kind of witness has been known to become so "worked up," that at last she has refused to give an answer that she may think favorable even to her own side, for fear it

The advocate will have observed that his opponent has driven this splendid creature with a bearing rein. In cross-examination he should take that off and let her "have her head." *"Did I understand you to tell my learned friend"* so and so? will be quite sufficient to set her at liberty if asked in a tone that conveys the cross-examiner's feeling on the subject. "I did *not*," with great emphasis, will be her last word. She will require some bridling in re-examination after that.

§ 128. **The Dogged Witness.**—The dogged witness is the exact opposite of the one we have just been dealing with. He will shake his head rather than say no. He seems always to have the fear of perjury before his eyes, and to know that if he keeps to a nod or a shake of the head he is safe. He is under the impression that damage the case he must, whatever he says. "A still tongue makes a wise head," has always been his maxim.

may be made use of somehow by the other. It is necessary, therefore, to watch for a fitting opportunity, and if the advocate allow her to make some particularly good hit against him which causes a laugh, she will be in an ecstasy of triumph and at his mercy. At the moment of her triumphant excitement will be the time to put the question; but it must not be done as though the cross-examiner thought it a matter of importance, but rather as if he were putting it for the purpose of turning off the laugh against him. While off her guard, if the question be well worded. the answer will slide from her flippant tongue before she has had time to consider its probable effect. But having got it the advocate passes away from the subject instantly by putting another question of no importance or relevancy whatever. This is a hint suggested by repeated instances in which it was observed that this mode was pursued by one of the greatest cross-examiners of the present time. The cross-examiner will find his advantage in the witness' triumph. It is, as some one has illustrated it, "not unlike a fencer making an overreaching thrust. Before he can recover his balance the adversary has delivered a well directed blow."

How is the cross-examiner to deal with him? If he has said nothing against his case he should, of course, leave him alone—*always, unless* he desires to draw something from him in its favor. If he cross-examine at all, he must beware of letting him think that he has any design of "catching him." Insinuation will help the cross-examiner with this witness. But he should carefully avoid asking for too much at the time. *He should get little answers to little questions*, and he will then find as a rule that answers are strung together like a row of beads within the man; and if he draw gently, so as not to break the thread, they will come with the utmost ease and without causing the patient the slightest pain. In fact, till he hears the advocate sum up his evidence, he will have no idea of what he has been delivered.

This witness, without being untruthful, is always hostile; he looks on the advocate as a dangerous man, a sort of spy. He will become bolder, however, as he proceeds, especially if the cross-examiner prove to him that he is by no means the terrible creature he at first thought him. And the best way to foster this idea is to accustom him to answer. The advocate should let him see that his questions are of the simplest possible kind; even so simple and so easily answered that it seems almost stupid to ask or answer them. "Of course," he says to one; "Certainly," to another; "No doubt about that," to a third, and so on. Presently the cross-examiner slips one in that is neither "of course" nor "certainly," and gets his answer. The advocate should look upon this witness as a lump of human nature in the witness-box, out of which he may, by ingenuity and skill, extract something be it ever so small, which may serve his purpose; some-

thing, perhaps, which he can find nowhere else in all the case.[1]

§ 129. **The Hesitating Witness.**—A hesitating witness may be a very cautious and truthful witness, or a very great liar. The cross-examiner will find this out before he begins to cross-examine. In most cases the hesitating man is wondering what effect the answer will have upon the case, and not what the proper answer is. By no means hurry this individual. He should be permitted to consider well the weight of his intended answer, and the scale into which it should go, and in all probability he will put it into the wrong one after all. If he should, the advocate should *leave it there by all means.* Besides, giving him plenty of time will tend to confuse him—as confused he should be if he is not honest. He cannot go on weighing and balancing answers without becoming bewildered as to their probable results. At every question he will look

[1] This witness may be an old man (generally is), and the subject of inquiry, a right of way. He may be the "oldest inhabitant." What are the moving springs of human conduct? Love of justice, which he has known from a boy upwards, and his father before him, as *"right is right and wrong is no man's right."* Self-approbation, or vanity, concentrated in him under the form of *"a wonderful memory,"* which has been the talk of the neighbors for years; the knowing more of by-gone times than any man or woman in the place; *Selfishness*, called by him his *"uprightedness and downstraightedness;"* Independence of spirit, *"he cares for no man, and always paid one hundred cents on the dollar"*—these are the vulnerable points in his armor; and if the advocate cannot thrust an arrow in at any of these he had better hang up his bow, for he will never make a good archer. His witness will answer anything if the cross-examiner appeal to his memory, or if the question put magnifies his independence of spirit, or brings out in all its dazzling luster that "uprighted ness and downstraightedness," of which exalted virtue he believes himself to have been ever a most distinguished example, if not the actual discoverer.

up in an oblique direction; his answer will be in an oblique direction too. Very often he will repeat the question to gain time. Sometimes he pretends not to hear, sometimes not to know; all this time he is adjusting his weights, and in all probability some of them are false. But the cross-examination should by no means lag; a halting cross-examination seldom goes far. Slow questions are usually feeble. With this witness they should be *asked* at the ordinary rate, or if anything, perhaps a trifle quicker, so that the hesitation may be more apparent and the blundering more complete.

§ 130. **The Nervous Witness.**—A nervous witness is one of the most difficult to deal with. The answers either do not come at all, or they tumble out two or three at a time; and then they often come with opposites in close companionship; a "Yes" and a "No" together, while "I don't know" comes close behind. "I believe so," or "I don't think so," is a frequent answer with this witness. The examiner must deal gently with this curious specimen of human nature. He is to be encouraged. It is no use to bray him in a mortar. Counsel often get irritable and petulant, and ask such questions as: "Will you be good enough to explain to those gentlemen what you mean?" This is bad, and "those gentlemen" generally dislike the soft solder implied. Some counsel may not know it, but they injure their clients by observations of this kind. Besides, the rebuke and the oblique flattery to the jury do not produce the effect of restoring the witness to firmness or self-possession. The cross-examiner should deal as gently with a weakness of this kind as he would with a shying horse. The ner-

vous witness, like all others, is either to be cross-examined or not; if he be, the cross-examiner must do it without driving him into such a state that his answer, however favorable, will have no value in the eyes of the jury; and this will surely be the effect of agitating him by petulant impatience.

§ 131. **The Cunning Witness.**—The cunning witness must be dealt with cunningly. Humor would be mere pastime, and straightforward questioning out of character with him. But by way of contrast, and for that only, straightforwardness may not be out of place with the jury. Whatever of honesty, whether of *appearance,* manner, tone or language, contrasts with the vulgar, self-asserting and mendacious acting of this witness will tend to destroy him. Every one can see that he tries to appear what he is not, and that he pretends to know a great deal more than he does. This is the man to show to the jury in his real character, and they will enjoy the cross-examiner's good-humored exposure of the cheat. But it by no means follows even then that they will disbelieve him altogether. They will discount his evidence and, without some corroboration, attach little weight to it. If contradicted by a respectable witness or a fact, they will discredit him altogether. The advocate will therefore assist him to play his own part, and to be himself; he will exaggerate and color in his own vulgar manner, utterly unable to perceive that he is producing a distorted account which no one will believe.

§ 132. **The Witness Partly True and Partly False.**—The *witness who is partly true and partly false,* without hypocrisy, knowing that he is giving color to some facts, suppressing others, and adding little ones

to make good measure for his party, is the most difficult of all to deal with. The process of separating the true from the false requires skill as well as ingenuity and patience. And the cross-examiner must bear in mind that it is not sufficient for him alone to know the nature and character of the evidence; his task will only be half accomplished at this point. There will still remain the more difficult one of exhibiting it to the jury in the same light and with the same aspect with which it presents itself to his own mind. The jury, untrained to sift evidence, will not so readily detect imposture and deceit as he; nor will they so easily distinguish between what is true and what is false when the ingredients are mixed up cunningly in the evidence of an artful witness of this description. If, however, the advocate can lay hold of any one part and expose an incongruity or an incompatibility, he will have accomplished a great deal. The cross-examiner must watch carefully to find out if there be a want of assimilation in the parts of the story; if there be a disagreement between some of the false parts and some of the true, he must ascertain whether the alleged facts can exist together and in connection with one another, and must cross-examine for causes and effects; he will then determine whether they agree with the facts stated by other witnesses.

§ 133. **The Stupid Witness.**—Another class of witnesses not infrequently met with in court is the stupid witness. There are many kinds of stupid witnesses, but the particular specimen to which attention is called is that civil and agreeable being who agrees with everybody for fear of disagreeing. He belongs to no exalted rank in society, and is not assisted in his worldly pursuits with a superabundance of the high-

est intellect. Now, if the cross-examiner thinks he has a witness whose evidence he can mould to any shape he likes, he thinks rightly, as he may make a piece of dough into a boat, but the important question is—will it swim? Will the evidence, manipulated by the advocate's utmost skill, be serviceable to his case? The line to take is not that which leads this kind of witness into mere inane contradictions of all he has said before. With a sharp person this would result in the overthrow of the evidence altogether. Not so, however, with that of the stupid witness; his evidence is essentially weak, unsupportable of its own fiber, and if the cross-examiner has noticed carefully he will have seen how tenderly it was drawn out, like the delicate haulm of the pea, and how carefully it was propped up with a forensic stick. What he has to do is *to take away its artificial support.* It need not be rooted up. It *simply is not what it seems.* Alter its appearance and *tendency,* and the cross-examiner will have done enough.

§ 134. **The Semi-Professional Witness.**—Another class of witnesses deserving of notice is that of the *semi-professional.* He is, in fact, semi-everything. He is half religious and half libertine; half teetotaler and half drunkard; half veracious and half liar; his word is positive and his respectability comparative. Imagination might describe this witness as a lean old man, with a high, narrow forehead and a much under-hanging lip, a mouth that twitches with self-importance and an impatience of contradiction. He wears glasses that shut up, and waves them with an air of consequence when he answers a question, putting them on and taking them off with his hand in front of his face when he wishes to evade a question. How will the

advocate cross-examine a man who has all the goodness of the canting hypocrite with all the pretensions of the scientific witness? *Tenacity of opinion* is his weakness. He will sacrifice truth itself rather than give up his opinion. Let the cross-examiner drive him into that net and he has him a safe captive. If he attempt to show that his opinion is valueless because he has not been articled to a surveyor, or is otherwise not a regular professional, the advocate will lamentably fail. The jury always resent an attack upon a man made solely because his knowledge has not been acquired in the orthodox red-tape manner. There are almost sure to be "self-made" and "self-taught" men on the jury. But, in whatever circumstances this individual may appear, if the cross-examiner wishes to attack his knowledge, he should cross-examine about *facts,* and he will soon learn whether the witness knows his business or not. If the advocate himself know nothing of what he is cross-examining to, the witness will beat him unmercifully at every point; if he do know something, he will plumb the depth of the witness' scientific ignorance very soon.

§ 135. **The Official Witness.**—A witness by no means of rare occurrence is the official witness. He is a man of many callings and varied appearances, but is of one type, and not even like any other.

He may be a subordinate in the civil service, or attached to a military department, to the naval reserve, or, as in the present case, he may be an "officer of the force." One "in authority" he must be, and in the service of the state. No mere offspring of a railway company could possess the air of self-importance, combined with ignorance, which belongs to the *"state official."* An inexperienced counsel must needs look

small before such a being as this; and, whatever may be his mode of attack, yonder human citadel has survived similar assaults and is prepared to stand a siege of questions from the oldest veteran in the field. The mode which the official witness adopts to defeat the cross-examination of a young advocate is to fall upon him with all the weight of his official arrogance. Brusque and loud as the tone of a drill sergeant to an awkward squad are the answers he throws at the inexperienced advocate; and every time this crushing force has been exercised the huge mass of authority lifts up its head above the official cravat and poses itself with a well-defined expression of "I am ready for you again, if you require any more, sir."

How to cross-examine this gentleman is the question. To which we answer: The largest balloon will burst if too much gas is forced into it. Self-inflated with the responsibilities of his office, the advocate may increase him more and more until the domineering ascendancy in the witness-box will be an indication of the domineering arrogance he would exercise over a prisoner. The cross-examiner will make him writhe by *appearing* to dispute his evidence, and will intoxicate him with his self-importance if he administers it in suitable doses. When he becomes too great for the witness-box the jury will see that he is out of proportion, and when he most protests by his manner that he ought to be believed without question the jury will most distrust him, always supposing that he has to rely upon the strength of his own veracity, which is not very great.

§ 136. **The Policeman as a Witness.**—Every one who conducts a defense in a criminal trial has to deal with police testimony, and as a class of evidence it

figures more conspicuously in criminal courts than any other. Again, it is to be said, as far as possible leave them alone. They are dangerous persons. They are *professional witnesses,* and in a sense that no other class of witnesses can be said to be. Their answers generally may be said to be stereotyped. All the ordinary questions have been answered scores of times by the well-disciplined "active and intelligent officer." Without accusing him even by implication of having no reverence for the sanctity of an oath, it must be said that if he sees the drift of the cross-examiner's questions, the chances are against getting the answers wanted. He thinks it is his duty to baffle the prisoner's advocate.

To be effective with the policeman the cross-examiner's questions must be rapidly put. Although he has a trained mind for the witness-box, it is trained in a very narrow groove; it moves as he himself moves, slowly and ponderously along its particular beat; it travels slowly because of its discipline, and is by no means able to keep pace with the advocate's, or ought not to be. The latter should not permit him to trace the connection between one question and another when he desires that he should not do so. If the cross-examiner ask him whether it was a very dark night, and the darkness has nothing whatever to do with the issue, he will commence a process of reasoning (invented at Scotland Yard) as to the motive of the question and what might possibly be the effect of his answer. While this mental exertion is going on, he should be interrupted suddenly with a question the advocate has good reason for putting, and in all probability he will get something near the answer he requires.

Policemen have a great deal of knowledge about the case and a great deal of *belief*. The former will be found bad enough to deal with, but the cross-examiner must be careful not to elicit a large quantity of the latter; if he does, he may rest assured it will look so like fact that it will pass with the jury as such.[1] Furthermore, it is dangerous to put "fishing" questions to this class of witness. The cross-examiner is almost sure to catch the wrong answer. His safer course will be to cross-examine for contradictions and improbabilities, not forgetting where necessary to give the witness the opportunity of denying anything upon which he intends to contradict him. Cross-examine for prejudices, and as to opportunities it should be remembered always that there is often as much in the manner as in the matter of cross-examination, and much more at times in silence than in both. The police constable is not below human nature generally. The parent of many of his faults is the fact that subordinate judges, as a rule, think he must be protected *by an implicit belief in his veracity*. As a natural consequence he falls into the error of believing in his own infallibility.

§ 137. **The Truthful Witness.**—The truthful witness has been said to be the most difficult of all to cross-examine. On the contrary, however, he is the easiest of any. By the term truthful, it is not intended to be implied that the evidence of the witness is necessarily

[1] "What did you say when you apprehended the prisoner?" asks Jones, eager for the display of his severe ability in cross-examination.

"Oh!" says the active and intelligent, "I forgot that."

"I beg your pardon. I said: 'Now, Sykes, when you come out from doin' the last seven year, you told me you meant to turn over a new leaf, and 'ere you are again."

And there the learned counsel was again!

true. If it were so, it would be idle to cross-examine at all. By a truthful witness is meant one who believes and intends his evidence to be true. He is the easiest to deal with, because he does not equivocate or prevaricate. He has no secret meaning, and gives his answers readily and without mental reserve. He desires to tell all he knows, and his credibility is unimpeachable.

The first thing to ascertain in cross-examining a witness of this class, is whether he has any strong *bias* or *prejudice* in the matter under inquiry. One or two carefully worded questions will discover this, if the cross-examiner has not already learned this from his answers in chief. Suppose, for example, he is a clergyman, and the question is as to a certain place of entertainment being a nuisance either as being badly conducted or conducing to immorality. He tells truthfully enough what he has seen, and speaks with indignant or pathetic tones of the vicious example to the inhabitants of the neighborhood. In his evidence in chief he will speak in general terms, probably, and not descend to particular instances; but the advocate will learn, by closely watching, whether he has any particular examples of debauchery or profligacy to depose to. Of course, he is not to draw these from him if he have any; this, of course, he will carefully avoid, but if the witness has not referred to particular instances, the cross-examiner may safely proceed to lead him to condemn all places of public amusement of a similar kind. If he leads him gently he will follow with remarkable docility. This course has been pursued by eminent advocates with great success. A man who condemns all alike is not the witness to impress a jury with the value of his evidence in the particular in-

stance, especially where it is far more a matter of opinion than fact.

§ 138. **The Convict as a Witness.**—It is by no means unnecessary to say that if a convict comes into the witness-box, it is idle to attack his credit through his character. Every young advocate thinks there is such an opening here, and the temptation is doubtless great. But there is no need to attack when the fortress has surrendered. The man stands confessedly as bad as bad can be; and to carry him through all the scenes of his profligacy and crimes would be but gratuitous cruelty, and would have no effect with the jury except in creating some amount of sympathy on his behalf. They know well enough how to discount the evidence of so abandoned a man; but they know, too, (and that is the point to remember) that the most detestible villain is yet capable of telling the truth. A convict will sometimes defeat a cross-examining counsel to such an extent that he will arouse sympathy for himself and prejudice against the learned gentleman. It is the weakest remnant of a very old style of advocacy to ask the jury, "Would you believe such a villain, on his oath?" The answer is, Of course, they would, as against another villain not upon his oath, and against whom he is circumstantially testifying, *unless* the advocate can break down his *evidence*; the latter will not do that by hammering away at his character. The jury may not like the man any more than does the advocate, but they may like the advocate's client less; and between two villains, the one in the witness-box and the other in the dock, as a rule, they will lean towards the former; he, at all events, is *for the state*—at present.

It is when his motives lead him to the *falsification*

of facts, and the falsification is apparent or *highly probable,* that the cross-examiner can dispose of this witness. Then will he be able to take character, motive, false or exaggerated statements, contradictions and probabilities and throw them into the scale against the apparently truthful portions of his testimony. Or if the advocate even go so far as to show *improbabilities in his story,* the witness will need much corroboration to make it acceptable to the jury. They will treat him as they would a knave in the market whom they should detect with one or two bad coins among a handful of apparently good ones. They would have no dealings with him; not because there were no good pieces, but because suspicion attached to all. To repeat, it is testimony and not character the cross-examiner must deal with in this witness. Misfortune is misfortune, whether it comes from a too lavish exercise of virtue or a crime; and cruelty is cruelty, whether inflicted on saint or sinner. If the advocate would succeed with a clever scoundrel, he must break him down by art, not by violence.

§ 139. **The Private Detective as a Witness.**—The private detective belongs properly to the class of professional witnesses. And here, as the converse of the last it should be remembered that the value of this witness' testimony will be in exact proportion to the estimate the jury form of his character. If it be unimpeachable for disinterestedness, so much the more difficult to deal with in cross-examination; but if the witness be one who is constantly giving evidence as a part of his professional duties, it will be somewhat discredited. What is always being done sometimes gets done mechanically and without any mental influence.[1]

[1] "I applied," says one witness, "the usual tests, and found traces

The office of the private inquiry man is distasteful to most people, but the advocate cannot well reach him in cross-examination as to that. If he shows that he obtains his livelihood by getting up cases and then proving them, it will be sufficient for his purpose without wounding his feelings. The cross-examiner's object is to give a color to his evidence, and he may, by the exercise of a little skill. The absolute positiveness with which this witness gives his evidence is a point in the advocate's favor; the impossibility of his having been mistaken is another; simply because the jury will not believe in the infallibility of a human being in carnal matters. And if the witness *might* have been mistaken they will not believe him either. So that the circumstances under which the detective has made his discovery are matters worthy of the cross-examiner's skill. With his suspicion is *almost* guilt, and almost every circumstance from his point of view is suspicious. Once assume a person's guilt, and the most innocent circumstance will become invested with suspicion; many facts will be unconsciously exaggerated, first in the mind of the witness, and then in his evidence: suspicion, in short, will become facts and facts guilt. There is no more dangerous class of evidence than that of the private detective, but none that a skillful counsel can more easily demolish, unless it is supported by independent testimony.

§ 140. **The Handwriting Expert as a Witness.**— Here is the witness to prove that the prisoner is guil-

of poison." No one dreamed, till the cross-examination disclosed the fact, that *the traces were introduced by the test itself.* Some profes- they are swearing away a man's life, or his wife, or his estate. It's sional witnesses seem to have no appreciation of the awful fact that only a matter of *science* with them.

ty. "No, no," says the expert to himself, "not I. You have given me specimens of handwriting to examine; I say they are in the handwriting of the prisoner. *You* say if he wrote them he is guilty, and so will say the jury." Beautiful distinction, but did you happen to know the probable effect of the examination before you made it, *Mr. Grapho?* Here is a dangerous question when the witness is watching the advocate as a doctor would the changing expression on a patient's face, and arranging his thoughts scientifically, as he gracefully toys with his invaluable glasses. The advocate must not think he must put so important a question in *that* form? The witness sees it—*sees his thoughts through it,* as though it were a lens; sees his weakness through it. The cross-examiner must as carefully conceal his meaning from this witness as though he were sending a telegram through him to the jury in cipher, so that he should *not* read it. The answer to this question, when properly put, may be *very near the foundation of the cross-examiner's defense.* What the advocate wants to know is, *what influence was at work in his mind which may have led him to a particular conclusion* with reference to the loop of a G or the twist of a Y. How came he to think it was like the prisoner's? Did he know that a murder had been committed?

The witness was *not* told, but if he had read of the murder he would know two facts; one that a document was left by the murderer stating that someone else had committed it; the other that a shopman was the last person seen with the deceased; *and* he would know a third fact when the books in which were entries made *by the shopman* were given into his hands to compare with the *fatal paper.* So it is seen the expert would

have no vague or indefinite idea of what he was about. That is the first point to establish: *not how long he has been studying his profession.* The next point to make is *as to the mode* of examination by this experienced expert. And here the advocate will be amazed at the elaboration of the system for finding out nothing, which has been invented by science. He, "first of all," he says, takes the "*undoubted handwriting* of the prisoner's;" this is one of his scientific phrases—"the undoubted handwriting of the prisoner's;" and he "*examines for peculiarities*"—another. But this is begging the question at once,—*are* they peculiarities? He calls them so and stamps them with guilt.[1]

[1] For instance, the witness finds "on line thirteen of page fourteen, your honor," nodding at the judge with nervous respect. "Line thirteen of page fourteen"—says the judge, counting vigorously—"yes, I see; I've got it." "Your honor will find"—here a sly look at counsel, as much as to say, now listen to this revelation—'the down stroke of the F in fool is at a very *remarkable angle*, an angle of fifty-four and a half. Now, this angle occurs only about once in fifty-four millions of handwritings. Then I find in looking at the disputed handwriting at page four of the day-book, line twenty-two, the F in the word *foot* has precisely the same angle and the peculiar *crook*, if I may so call it,"—pauses as though this powerful expression must elicit silent applause. The advocate should mark this scientific discovery and cross-examine upon it, because it is totally inapplicable and no more a "crook" or a peculiarity than he will find in the handwriting of nine persons of the prisoner's class out of ten. This is a *new symptom*, and all new symptoms are in the cross-examiner's favor if he can use them.

"If you turn, your honor," says the witness, stooping down over the book and now looking up at the judge, and now looking down at the insect he has under observation; shaking his glasses twice above his shoulder with his right hand as he looks up, and pressing his book twice with the open palm of his left as he looks down, as if he had just clapped it on a butterfly; "if your honor looks at the bottom line but five on page four you will find a *remarkable peculiarity*—it's a twist just where the F *joins* on to the B, giving the F a humpbacked appearance. (A pause.) Now, your honor will find that *dislocation* or *twist* of the *spine* of the F occurs in no

Here is the cross-examiner's opportunity. Once show that the prisoner's life depends upon the downstroke of a "D" or the upstroke of a "C," the crossing of a "T" or the dot of an "I," and he will live. There are such things as forgeries, and forgers imitate peculiarities. Handwriting is seldom to be believed, even when it speaks the truth.

§ 141. **The Medical Witness.**—With regard to medical opinion, Sir Alexander Cockburn said: "A medical man ought to be asked his opinion on the supposition only that certain symptoms existed." This pas-

less than two places in the undoubted handwriting of the prisoner." (Sensation.)

Next comes a cross of a T at a very acute angle which he finds in other places as well; then there is the "*Convolution of the G.*" "This convolution occurs no less than five times in the fatal document and five times in the book, a *very* remarkable coincidence, your honor." This is said at an agle of forty-five. "Next, your honor, there is a capital I, and I particularly call your honor's attention to the *perpendicularity of that* I; or rather, I should say, to express myself with more scientific accuracy, the want of perpendicularity of the I." (The I looks indeed as if it had been out all night.) "Now, that absence of perpendicularity occurs three times in the undoubted handwriting of the prisoner, and no less than twice in the disputed handwriting. There is next, your honor, at page five, line seventeen, an O which is made like a *semibreve.* Then, there's a J of a very remarkable and pronounced kind; it will be observed that the loop or convolution is *elongated.* This is at page six, line two; and it occurs twice in the fatal document, and once in the undoubted handwriting. The next letter I come to is a W, which is found on page seven, line eight of the day-book, and occurs three times in the fatal document. Your honor will observe that it is *serrated,* or (turning to the jury) *like a saw, gentlemen.* And that same serrated appearance is observable in the M's of the undoubted handwriting of the prisoner."

And thus through the alphabet the witness has hooks, crooks, crosses, convolutions, semibreves, humpbacks, dislocations and deformities of all sorts, and letters that look like murderers, burglars and other disreputable persons, with the common hangman amongst them. But bring common sense to bear upon it in cross-examina-

sage is quoted as authority for saying that medical testimony should be based not upon a mere theory with a view to fit in the facts of a particular case to it, but that the theory should be constructed from the *proved facts*. Given certain symptoms, or facts, the scientific opinion should be given upon them, and upon them only. A great deal of what is termed medical evidence is not medical evidence in any sense of the term, except that it is given by a medical practitioner: and in the same sense as a woman's might be said to be "female evidence." Much that a scientific wit-

tion; so shall the advocate reduce these exaggerated peculiarities to the natural tendency of persons *to copy one another*. We are such imitative creatures that we copy when we do not intend to, and often even against our wills.

"I find," continues this field-marshal of pot-hooks and hangers, "that there is a remarkable—"

Pray stop him, my learned friend!

"One moment, Mr. Witness!"

"Excuse me," remonstrates the man of letters, jerking his spectacles at the presumptuous counsel.

"Forgive me," implores the latter, "but what are you looking at?"

"I am looking at the day-book, sir?"

"What part of the day-book, sir?"

"Excuse me, sir; but if I am not to go in my own way, I cannot go on at all. Your honor—"

But "your honor" is not there to assist the prosecution.

"Are you comparing the *proved handwriting* of the prisoner in the day-book with the murderer's paper?"

"I am comparing, sir, the entries in the day-book which I have *compared with other entries*, and I find—"

"You will shut up that book, then, if you please."

"Really, sir, if I am not to go in my own way, I am no use—"

Judge: "If you are comparing entries *not* proved, with entries that are proved, to show that they have similar characteristics to those shown on the murderer's paper, *that is not evidence*."

"Then I cannot go on, your honor," closing his book with a bang! *Shut up!*

ness gives might be given as well by an ordinary person, and very often a great deal better.[1]

If one looks at a plain fact through the lens of scientific language its shape usually becomes distorted. Giving a man a "black eye" may be considered a trifling offense, and a jury might acquit; but impress them with the idea that the prisoner caused "extravasation of blood under the left orbit," and he is regarded as a monster of cruelty to whom no mercy can be shown.[2]

His evidence is accordingly *struck out*, and all his elaborate theories based on imaginary likenesses are dissolved.

[1] "I discovered considerable ecchymosis under the left orbit, caused by extravasation of blood beneath the cuticle," said a young house surgeon in case of assault.

Baron Bramwell: "I suppose you mean the man had a black eye?" Scientific Witness: "Precisely, my lord."

Baron Bramwell: "Perhaps if you said so in plain English, those gentlemen would better understand you?" "Precisely, my lord," answered the learned surgeon, evidently delighted that the judge understood his meaning, and accepting the rebuke as a compliment.

[2] *Apropos* of the quickness with which medical practitioners sometimes arrive at a conclusion, here is a case that occurred some years ago. A woman who had cohabited with a tradesman in a country village suddenly disappeared. Her paramour gave out that she had gone to America. Some years after, a skeleton was found in the garden of the house where she had lived. On examination by a medical man *he at once pronounced it to be that of the missing woman.* He formed this opinion from the circumstance that one of the teeth was gone, and that he had extracted the corresponding one from the woman some years before. Upon this the prosecution was instituted, and the man was committed for trial to the assizes. Fortunately there was time before the trial came on for a further investigation of the garden where the skeleton was found, and on digging near the spot another skeleton was discovered, and then another, and another; then several more. This threw some doubt upon the identification of the bones in question, and on further inquiries being made it turned out that the garden

§ 142. **The Vanity of Witnesses.**—There are other witnesses, doubtless, slightly varying in their peculiarities of disposition and temper, but these the reader will easily note from his own observation, and we doubt not will find, on examination, that most of them may be included within the classes enumerated.

But of whatever types they may be, and however much they differ from one another, there is one weakness which runs through them all, and that is vanity. No human being is exempt from its influence; and the only difference between one man and another in this respect is as to the object of his vanity and the effect of it upon the other attributes of his nature. One man's vanity may impel him to aspire to a coronet, another's only to wear his hat a little on one side and to put his thumbs in the armholes of his waistcoat.

had once been a gypsy burial-ground. It need scarcely be added that the prosecution, which had been vigorously taken up by the government, was at once vigorously abandoned.

CHAPTER XIII.

TACT AND TACTICS.

§143. The Meaning and Value of Tact and Tactics to the Advocate.
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159. Danger in Wandering from the Main Point.

§ 143. **The Meaning and Value of Tact and Tactics to the Advocate.**—Tact is defined by Webster as a "sensitive mental touch; the ready power of appreciating and doing what is required by circumstances."[1]

[1] The following quotation, which we have taken the liberty to alter, is very pertinent:

Tact, as thus defined, is quite easily seen to be a very important part of a lawyer's equipment. Many lawyers of great mental ability have been failures as advocates because of the lack of this one quality. They always manage to injure some one's feelings in a trial; they bring the jury and the judge to regard them unfavorably; they constantly fail to take advantage of opportunities; and proceed on their ponderous way to inevitable defeat. It is sometimes said of an advocate

"For a thousand who can speak there is but one who can think, for a thousand who can think there is but one who can see. The successful lawyer has the open vision. There is no blind side to either his eye or brain. Watchful as a lynx, with every faculty of the intellect strongly concentrated upon the prospect, not a contingency escapes him. A factor so subtle in its nature, so incomprehensible in its relation to other elements, and so susceptible of marvelous growth under suitable conditions and by reason of thorough cultivation, baffles the English language for an abstract definition. The one word 'tact' comes the nearest to it. Tact is defined as the ready power of appreciating and doing what is required by circumstances. Technically speaking, tact may mean touch, discrimination, wisdom or skill. Touch in the sense of manipulation—'throwing out a feeler'—discrimination in the sense of a nice perception or appreciation of difference, drawing fine lines, winnowing chaff from the wheat; wisdom in the sense of sagacity, grasp of intellect, acuteness, 'having one's wits,' seeing through a mill stone;' and skill in the sense of expertness, cleverness, genius —'hitting the nail on the head.' Tact is strong as Atlas, graceful as Venus, fleetfooted as Mercury. He comprehends peculiar situations with a completeness that leaves out none of the details. 'Tact is the eighth wonder of the world.' Memory is not tact, but tact never forgets. Perception is not tact, but tact can see through a brick wall. Reason is not tact, but tact somehow always gets the best of an argument. Talent is not tact, but tact hasn't any folded in a napkin and laid away. Genius is not tact, but tact is most ingenius. Learning is not tact, but tact is versed in all the wisdom of the ages. Art is not tact, but tact is an artist. Science is not tact, but can apply scientific principles to men and things. Courage is not tact, but tact never pales with fear or hides his face with cowardice. Common sense intensified is just another name for tact."

—"He is not a great lawyer, but he is a very clever law practitioner." Study the methods of one of whom this statement can be made; observe the skill with which he ingratiates himself into the favor of court and jury; notice his gentle handling of a stubborn witness until he "worms" out of him the answer that he desires; watch him as he studies the countenances of the opposing witnesses on their examination-in-chief, and see his face light up with intelligent perception as he sees something lying hidden beneath the outward show of facial and verbal expression; listen to him as, in his clear, convincing and winning manner, he presses home his objection to the introduction of some damaging evidence on the part of his opponent, or the nice discrimination with which he seeks to withdraw some evidence which he himself is seeking to introduce from the effect of some rule of law which would seem to prohibit its introduction. Let the advocate observe all these things and the many other unwritten incidents of a trial in which the tactful advocate is always able to find opportunities to further the cause of his client, and the student has received his first lesson in the art of legal tact, a lesson which he can never hope to learn out of books nor under the voice of the lecturer.

Tactics, though akin, is nevertheless quite a different thing from tact. Tactics is defined by Webster as "the success and art of disposing military and naval forces in order for battle; and hence any system of procedure." To the advocate no general qualification, next to tact, is so necessary as a proper system of legal tactics. Tactics in law relate to the science and art of presenting the evidence in a masterful and convincing manner. Sometimes an advocate who has a good case will so awkwardly present his evidence as to actually court defeat; while, on the other hand, one with only

an indifferent case will so arrange the forces that tell in his favor that they present an almost irresistible front. The latter advocate has mastered the science of legal tactics. How to *present a case,* is indeed the question upon which the verdict will in most cases probably turn. If we examine the great trials, and more especially the speeches of the best advocates, it will be found that the *mode* in which the case was presented had much to do with every successful result. Particularly is this observable in the defenses of Erskine, whose advocacy, in its arrangement and order, was so masterful and effective.

As we have already intimated, neither tact nor the science of tactics can be most directly learned from study or books; they come rather from experience and observation. What suggestions we offer here are only to warn the advocate against the most glaring instances, of lack of legal tact and the most prominent and important rules in the science of legal trial tactics.

§ 144. **Delicacy of the Proceeding to Impanel the Jury.**—Too many advocates handle a jury as if the fingers of their minds were all thumbs. They are rude, boorish, insolent and overbearing. In examining the panel they pry into a juror's private affairs as if he were a witness or a party interested in the case. Not only the jurors thus examined but the whole panel, if they are men of spirit, will resent this course of the advocate. Courtesy is an accomplishment to any man; but to the advocate it is a valuable asset; and nowhere is the lack of it more painfully felt than in the advocate's handling of the jury. In the selection of the jury, especially, care must be taken to frame the interrogatories in such a manner

as not to give offense and to maintain throughout the entire proceeding an attitude of the strictest courtesy. An advocate that makes a favorable impression at this early juncture has quite handicapped his opponent. Of course, it is important to examine jurors, in most cases, to find out what interest they may have in the case; what knowledge of the facts they may possess; what relationship any one of them may sustain to either of the parties; what expressions of opinion may have been uttered as to the merits of the case; what personal hostility may exist between any one of them and either of the parties to the case; and considerations of a similar nature. A short, courteous examination of each member of the panel will generally be sufficient to find out all the advocate desires to know. Much information, it must be understood, will come to the advocate by way of careful observation.

Sometimes the nature of the case is such that the advocate has learned sufficient from his opponent's investigation to satisfy him. In such case it is good policy to waive examination. It is always a delicate proceeding at best.

After the advocate has completed his examination the exercise of his right to make a certain number of peremptory challenges is a matter, sometimes, which demands an intimate knowledge of human nature. The advocate must keep off from the jury in his case any man whose business, religion, or crankish notions of things would influence his judgment on the particular facts involved. In damage suits, for instance, of servants against master, care must be taken to exclude any large employers of labor. So, also, in suits involving the enforcement of the liquor laws, enthu-

siasts in the cause of prohibition must be challenged on the one side and anyone engaged directly or indirectly in the manufacture or sale of liquor on the other. These are two prominent instances; others requiring a more delicate appreciation of human nature will occur to the advocate who closely studies the situation and has a fair measure of common sense.

§ 145. **Ascertaining Motives Tending to Influence the Jury.**—It should always be remembered that one of the most difficult things in advocacy is to ascertain the motives which influence human conduct, and yet these motives are in a great measure the advocate's guides. Unless these can be discovered the advocate will be working in the dark and will only succeed, if at all, by accident. If we could look into the minds of the twelve jurymen we should probably find as many reasons for their verdict. One was predisposed to believe a particular witness; a second had a similar predilection for another; a third disbelieved the defendant because he did not like "the looks of him;" a fourth was rather taken with the plaintiff's manner; a fifth had heard something not much to the credit of the party he meant to find against; and so on, until you came to the twelfth, who simply "*jined in like*" because he was a man of a very agreeable nature. Much may depend upon the juror's breakfast or his digestion. With many juries there is the predominating thought, in spite of much evidence to the contrary, that the plaintiff is *entitled to something.* Some think he must be in the right or he would never have brought his action; as they think a prisoner must be guilty or he would not be on his trial.

§ 146. **Determining the Leading Point in the Case.** —In most cases, if not in all, there is a *leading point* which, if established, will determine the verdict. Before the case can be shaped, this point must be discovered and placed in *exactly its right position.* All the evidence and all the facts must be subordinated to it. Sometimes it happens that a false point usurps the position of the true. This, however, it need scarcely be said, is fatal to the advocate who knows so little of his case. It is possible to be drawn away to a minor issue; but if the advocate should be he will find it difficult to get back to the true one; and it is the surest sign that he has never mastered the rudimentary principles of advocacy. To the unpracticed genius this seems so intolerable a blunder, that no one could by possibility commit it. The unpracticed advocate, however, is the only one who never makes a mistake. Advocacy is not so easy as beating a drum; and if all the blunders of clever advocates were to be told, the student would come to the conclusion that practice makes us most imperfect; and that the art is more calculated to benumb the faculties than to quicken them.

§ 147. **Proper and Improper Openings.**—We know that a case may be opened in a variety of ways. The direct way is the nearest to the verdict. Sufficient rhetorical skill to make the advocate's statement agreeable, and such an arrangement of his evidence as to make the matters alleged *seem* true, are the characteristics of a masterful opening. To get the jury to accept his interpretation of the case depends almost entirely on his mode of putting it; this is the effect produced by harmonizing evidence and making his allegations look like actual facts; an artist would

say—herein consists the art of mixing colors. What the advocate requires is to get it into the minds of the jury *in such order as to make the conclusion clearly deducible from the facts.* For instance: what would be the use of cross-examining to the credit of a witness when the facts he has spoken to have been proven by persons of unimpeachable character. The advocate may be as "severe" and "powerful" with him as he likes, but the jury will think he is ruining the case. Severity is not power, and power is seldom severe. But suppose the advocate to be judicious, and to refuse to turn him inside out. He will perhaps endeavor to do something more artistic with him. He is a witness *vouched for by the other side as worthy of credit.* Any answer the advocate can get from him which will damage the evidence of the other witnesses will be of immense value. He can take him into his confidence on account of that character which he is instructed to expose. His manner of handling him is part of the tactics of advocacy, and, according as it is conciliatory or severe, he will make him a witness for or against him.

There is one mode of presenting a case which is pretty sure to ruin it—*the jocular mode.* An advocate who begins by playing the fool is almost sure to end in making one of his client. Jokes are not of much value to the plaintiff, unless he wants laughter instead of damages; while, on the part of the defendant, they are a poor answer to facts. Laughing a case out of court has been often heard of, but never accomplished. No judge would permit it unless he preferred a joke to justice, and a jury has never been known to laugh away a litigant's rights. True, the advocate may laugh his own case out of court very

easily; and if he have no case he may as well dismiss it with laughter as with tears—as a bad soldier is drummed out of the regiment; nevertheless, the drumming ought not to be the *cause* of the dismissal. These remarks, however, are by no means intended to detract from the value of *humor,* the efficacy of which has been elsewhere considered.

Again, it should be observed that seriousness need not be sepulchral. It is in finding the unaffected medium between these extravagances of style that this branch of the art of advocacy consists. The advocate need not proceed as if he were moving to muffled drums and the *Dead March;* the jury like a brisk pace and a lively air. The advocate should keep them in good spirits, if he wants good damages. Recollect they are not being asked to give their own money away, but other people's, and the livelier he can keep them, the more generous are they likely to be; damages are often increased because the jury are taken with the advocate's *manner.*

§ 148. **What Witnesses Should Be Called and in What Order.**—Another matter is worthy of attention. Advocates are often perplexed with the question, "*Shall we call witnesses?*" In the first place, it is a question which the counsel should take into his own hands. No solicitor can answer it for him. He can but give him the evidence upon which, in his discretion, the advocate must decide. Nor must he in the least fear the too frequent lamentation, "If we had only called our witnesses!" But the true test is unmistakable:—*Are they necessary?* If not, he should never sacrifice the reply. There is a further consideration, even if they may be useful, but not altogether necessary, what will be the *value of the witnesses*

under cross-examination? They may look very well on paper, and put the advocate out of court in the witness-box. He is always in danger from his own witnesses, especially if he have more than enough. As a general rule, they are worthless when the question is debatable as to whether he should call them or not.

But if called, does it matter as to the order in which their evidence is given? It matters much in every way. The advocate may lose the verdict through a want of connection and sequence. Things present a vastly different appearance when they are orderly arranged, and when they are in confusion. The best rule, of course, is for the advocate to call his witnesses in such order that their evidence will produce the best effect upon the jury. To do this he must adjust the parts, even the minutest, with a view to the general design.

This, too, may be taken for granted, when a client is alleged to have committed a wrong, or to have done something which it is necessary to disprove; not only should he be the advocate's *first witness,* but *his denial should come at the earliest moment in his evidence.* Delay will look like reluctance, and reluctance like guilt. Whatever is the main point in the advocate's case as a rule, should be placed in the forefront by the principal person concerned. The reason is obvious; the impression being made at the earliest moment, the effect will be greater and more enduring, as farther removed from the immediate attack.

The "order of time" has been referred to in a previous chapter, as a matter of importance; *the order of value* is of no less moment. After the leading fact has been placed in its central position, the witnesses

should be called, so as not only to confirm it, but so that the evidence may be self-supporting, by its compactness and completeness, as the parts of a well-turned arch which no pressure can destroy. Nor should the evidence be produced *only* with a view to the general design; there is something else that can be done, if you are for the defendant. Having observed the testimony given by the other side, the advocate's own evidence may be arranged not only with a view to contrast but so that it may *seem to be invested with a greater degree of probability* than the opposing evidence.

With regard to the value of witnesses, it should not be forgotten that, if, after the plaintiff or defendant (as the case may be), the advocate proceed to call his best witness, and then graduate them until he comes to the worst, his case will be tapered down until it will seem to rest upon its weakest witness. The jury will follow the course of the evidence to its vanishing point, and the advocate will wonder why it had no more effect than to make them shake their heads. If the advocate call a number of weak witnesses one after the other, the jury will come to the conclusion that the case is weak, and the evidence of the stronger witnesses will be proportionally discounted; whereas, if he has a number of witnesses, weak and strong, but all necessary, he should lead off with a small witness from his strongest suit. It may be that the order of time or circumstances will decide as to the next; but he should always endeavor to follow up weakness with strength.[1]

[1] Let us suppose the witnesses are pretty equal as to the value of their testimony, and that the order of time is not necessary to be observed; is there any reason why one should be called into the box earlier than another? Undoubtedly. They are not all *equally*

Another point must not be omitted. A story told in parts by different witnesses is stronger than the same story repeated by the whole of them. It will *seem* to be truer, and even look *as if it must be true;* whereas, repetition, especially in details, often makes it look as if it must be false. A further advantage attends the divisional form—*there will be less surface exposed for cross-examination.*

§ 149. **Superior Value of Oral Testimony to Written Depositions.**—As far superior as a warm, affectionate embrace is to a cold and formal introduction, so far superior are the burning words of an oral testimony to the cold, black type of a written or printed deposition. An advocate makes a great mistake to introduce the deposition of any important witness whom he might, by any possible means, have at the trial. Indeed, in most cases, it would be profitable even to defray the expense of a long journey in order to get the witness into court rather than to be compelled to rely upon his deposition. The reasons for this are obvious. In the first place, testimony by deposition is lifeless; it lacks that fire, that spontaneity, that impulsive iteration of oral testimony which often compels belief. In the second place, jurors are generally suspicious of such testimony; they are not aware of the auspices under which it was given, and

capable of resisting cross-examination. If the advocate take one of the worst in this respect before the others, and he should stammer from nervousness, or give the wrong answer from misunderstanding, the examiner has done at least two bad things for his client; he will pretty nearly have ruined his case with the jury; and he will have put so much heart into his adversary that he will cross-examine the rest with renewed vigor; whereas, if he put a witness into the box who can stand the cross-examination, the contrary effects will be produced. Nothing is more disheartening than failure in cross-examination, except failure in resisting it.

are inclined to the opinion, and not always unjustly, that the answers to the interrogatories have been carefully studied and couched in language calculated more to serve the purposes of the party in whose interest the witness testifies than the demands of truth and justice. The jury feel also that they have been denied the opportunity to "look the witness in the eye" and thus, in this very effective and often conclusive manner, test the credibility of the evidence he offers. In the third place, many important points in the testimony of the witness overlooked in the preparation of interrogatories are brought forcibly to the mind of the examiner under the stimulus affected by the heat and vigor of the contest. From every point of view, therefore, oral testimony is to be preferred to written depositions.[1]

§ 150. **How to Take Care of the Weak Point in a Case.**—We must not omit a matter which is constantly

[1] The difference between depositions and oral examinations in open court is well stated by Blackstone: "This open examination of witnesses, *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law; where a witness may frequently depose that, in private, which he would be ashamed to testify in a public and solemn tribunal. There, an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. * * * In short, by this method of examination, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing and read to the judge in the absense of those who made them; and yet as much may be frequently collected from the manner in which the evidence is delivered as from the matter of it." 3 Blackstone's Commentaries, 373.

peeping out, however carefully it is concealed, and that is the *weak point* in the advocate's case; there it is, conceal it as he may. If he wants it to tell as forcibly against him as it can, leave it to the mercy of the other side to drag it out. If he desire it to be presented in its most favorable aspect, introduce it himself. A man is always tenderer to his own faults than he is to other people's. With proper management a weakness may sometimes be turned to advantage. A good sneer from the advocate's opponent at the poverty or misfortune of his client, will tend to the solace of the one and the mitigation of the other. A sneer may be the very worst of advocacy, but that does not prevent a bad advocate from using it. Nay, it is no advocacy at all, it is sheer unmitigated abuse; but there are clients who will pay even for that. Endeavors to excite prejudice generally succeed in evoking sympathy. Nothing is so fatal to a speech or a cross-examination as an exhibition of ill-feeling.

§ 151. **Admissions by Counsel or His Client.**—Some of the greatest dangers and embarrassments of a lawsuit arise from loose and reckless admissions on the part of counsel or his client before or during the trial. While it may seem discourteous not to confer freely with opposing counsel about the facts of the case, especially where an amicable adjustment is sought, counsel must never lose sight of the fact that negotiations for a compromise may fail and the point at issue be submitted to the white heat of a judicial inquiry where every admission on his part will but add fuel to the flames. But probably it is not so much counsel as his client who needs thus to be cautioned. An attorney should insist strictly on his client refusing any interview whatever from opposing counsel

or the latter's client or any of their agents. Too many "good cases" have been damaged by such interviews for an advocate to disregard such tactics on the part of his opponent.

The best rule would be for the client to be instructed to have nothing whatever to do or to say about his case, and to refer all inquirers to his counsel; and for counsel, in as courteous manner as possible, so as not to give offense, to evade any discussion whatever of the important questions of fact involved in the case. Some writers on this subject have sometimes counseled admissions in writing.[1]

But we do not feel constrained to advise even the indulgence of this liberty of counsel with his client's cause of action. All admissions necessary or proper on the part of an advocate should be made in his pleadings.

§ 152. **Calculating the Value of the Evidence or the Verdict of the Jury.**—Neither law nor human nature is an exact science. Numerically calculated, one may say of the witnesses, twice one are two; in forensic arithmetic twice one may be *none*—nay, may even be one against you. Nor is the jury a body upon whom one can calculate with unerring certainty. The advocate's cause may be just, but that is no all-sufficient reason why they will find so. Facts may lie so deeply

1 Elliott's Work of the Advocate, p. 129. The author says: "Admission should be sparingly made and only after calm deliberation, It is unsafe to make them, no matter what their character, otherwiso than in writing. Experienced attorneys strongly advise against making any, except upon matters of minor importance, but this advice hardly goes far enough, for, even though the matter has apparently little influence upon the merits of the case, no admissions should be made without full consideration; and when made should, if practicable, be written out in full."

imbedded that the superincumbent strata may not in any way reveal or indicate their presence to the ordinary mind. The advocate's business will be to reach them by a chain of argument and natural inferences to be drawn from the evidence around him. If the jury were a machine into which he could thrust the facts at one end and take them out in the shape of a verdict at the other, all difficulties would vanish. This, however, is not the process by which verdicts are obtained. The first thing for the advocate is to present his evidence in a *probable* shape, the next is to get it believed, or *taken as believed,* by the twelve good men and true in the jury-box. Not so easy a matter, by any means, as at first sight it may appear.

§ 153. **The Value of the "Last Word."**—A great deal has been said about the "last word," but there can be little difference of opinion as to its value with a good advocate. It possesses a creative and an annihilative force. It has the field to itself, and works without opposition. In its course it will sometimes uproot arguments and disperse evidence, leaving nothing but ruin in its track; but it *may* be used to give the finishing touches to the opponent's case. All depends upon the knowledge of the advocate. In this matter of the reply, knowledge is of more value than genius itself; knowledge will include both the evidence and the best mode of presenting it. When the advocate has the "last word," evidence, arguments, theories, prejudices, sympathies, are at his mercy; ridicule, invective, persuasion, are ready for his service. Assuming things to be pretty equal, he must have studied advocacy and human nature to little effect if he does not win the verdict.

§ 154. **Adaptation and Arrangement of the Evidentiary Forces in the Closing Address.**—With all the advocate's native skill and ingenuity it may happen that he has not succeeded with his witnesses. He could not make them intelligent. The most powerful imagination cannot supply facts. The advocate may find out at last that he has a weak case. But what then? Shall he despair? By no means, if he have learnt something of the art he practices. A weak case and a strong advocate will often beat a strong case and a weak advocate. Now the strength of advocacy lies in the *adaptation of materials to the end designed.* If the advocate can adjust them so that, as a whole, they will *seem* to be true, he will win. The facts may be so arranged that they will look larger than they are, all things being large or small by comparison. Opposing facts may be made to look small by contrast, or may disappear altogether by being cast into the shade. It may be that the advocate has acquired a mode of *directness* in addressing the jury; he never uses an argument that they cannot "rightly make out;" his habit of "straightforwardness" fascinates them; he avoids all appearance of being an ingenious twister of facts, knowing that such ingenuity will be taken at the value of the conjuror's trick—clever but deceptive; he never mystifies his case by unintelligible language, but lets the facts speak for themselves; —he uses, in short, plain words to plain men, knowing that the object of honest speech is to be understood; and that when best understood he seems to be most honest.

§ 155. **The Court—Overcoming the Preconception of the Judge.**—This brings us to the consideration of another matter of no small importance in the

present day, when the tendency appears to be to supersede the jury-box with the bench. Let not the reader be startled at the statement that there is greater prejudice to overcome in a judge than in a jury. Although his honor could never be brought to believe in such a weakness, he will endeavor to *show* he has no prejudice, and this effort is the safeguard of the counsel. The prejudices of a jury are modified by a kind of mental attrition; sometimes they even neutralize one another. It is idle to attack a prejudice directly. Prejudice is reason-proof; but that is no reason why, in matters depending upon evidence, the advocate may not appeal successfully to the intellect. In doing so it will not be forgotten that a judge has a high sense of honor, and a desire to seem impartial. These are the safeguards against the infirmities which sometimes affect the noblest minds

§ 156. **The Court—Assuming That the Court Is Ignorant of the Law.**—It is a very common error, many times a fatal one, on the part of the advocate, to assume and even say that he "assumes that the court knows the law;" "of course the court is familiar with the law in this case." He had better, and he will if he is wise, assume that the court is densely ignorant of the law of his case, and then proceed to enlighten the court upon the law of his case, for if it so be that the court does know the law of his case, all right, no harm is done; and if the court does not, the advocate may by his fatal confidence lose his case; whereas, if he would enlighten the court as he should, victory would be his. He has devoted weeks, it may be, to the law peculiar to his case, while to the court it may all be new.

§ 157. **How to Meet an Unscrupulous and Ill-Natured Opponent.**—If an advocate is not the subtlest cross-examiner in the world it is not the least reason why he should put *a dangerous question;* if he is not the greatest orator it is no excuse for talking about the wrong thing, or talking about nothing. Woe to the client whose counsel needlessly wounds the feelings of a witness! Even when obliged to ask a painful question, the jury will look upon him with dislike; and, if his manner do not soften the act, they will regard him as a wanton vivisector who delights in a painful operation and would by no means spare them under similar circumstances. But when we meet with an opponent who does not spare, how shall *he* be dealt with? The answer is easy. Be severely silent. The advocate should not retaliate, or he will undo the good his opponent's unscrupulous conduct has inflicted. He should leave himself in patient suffering to the jury, who in due time will reward his forensic forbearance. If, however, he think it wise to allude to it, he should do so in a manner that shall evoke pity as well as indignation; but he should be careful not to avenge his client by a counter attack of abuse; he should throw the blame at all times upon his opponent.

§ 158. **Under What Condition an Advocate Profits by Delay.**—We of course do not expect in this section to consider, to any extent, the law applicable to continuances and delay. Nevertheless, from the standpoint of an advocate a delay or continuance is often a most important consideration. The main reasons for delay, so far as the advocate is concerned, are lack of sufficient preparation and the absence of

important witnesses. While many books and the addresses of great lawyers expatiate generally on the ill-favor with which the request for a delay or continuance is regarded both by the court and the profession, we believe the subject has been exaggerated to such an extent that young lawyers, at least, are sometimes constrained to permit themselves to be rushed into a case totally unprepared, because of the fear of acquiring a reputation for carelessness and cowardice. It is of course a very discreditable thing for a lawyer to be always unprepared and to get into the habit of asking for continuances, merely because of his own slovenliness. Fabian tactics of that character will certainly be discountenanced both by the courts and the profession. But where by some unforeseen circumstance an important witness cannot be at the trial on the day set, or there is some reason why a trial on that day would materially work against the interests of the advocate's client, he is justified in seeking delay on any legitimate ground he can press forward as an excuse.[1] Some opportunity is generally afforded in the progress of any case to find some good reason on which to base a motion for a continuance. However, to be prepared to take effective advantage of every opportunity of this character the advocate must have the statutes and decisions of his

[1] "Caution is as important as courage. It is only the foolhardy, not the wise, who assume the hazard of trying a cause without ample time for preparation, or who risk a trial where important evidence that delay may secure is absent. Prudence requires that no risks be assumed where diligence and care can avoid them. Where there is a risk that a postponement will avoid, and there is reason for a postponement, then it is the part of wisdom and prudence to apply for a continuance." Elliott's Work of the Advocate, p. 156.

own state, and, to some extent of other states on this question and other questions of practice closely related to it, at his fingers' ends. If, however, as might be the case, no opportunity for delay is afforded, the advocate must seek the indulgence of the opposing counsel. The frequency with which cases are continued by consent in all our *nisi prius* courts is evidence of the magnanimous spirit and free-masonry prevailing among the members of the American bar; indeed with a reputable opponent no advocate need fear to meet with any denial to his first request for a continuance or for any other reasonable courtesy.

In criminal procedure the defense sometimes desires a delay not only for the reasons already stated but for the additional reason that sometimes it is well to avoid a trial at a time too near the date of the commission of the alleged offense. Public opinion is sometimes so strong that an impartial jury of the vicinage would be a practical impossibility. A few months' delay will sometimes cool the intense anger of the populace and insure a fairer trial.

§ 159. **Danger in Wandering from the Main Point** —One of the most universal tendencies of the human mind is to wander from the original thought which it may have started with at a given time, into by-paths which branch off from it at many and frequent intervals. This besetting sin of the human mind may sometimes lead the advocate, either in the presentation of his evidence or in his address to the court or jury, to wander from the main point at issue and not only confuse the minds of those addressed but at the same time dissipate the energies of the advocate which might have been more profitably employed in batter-

ing away persistently at the main stronghold of the enemy. Of course the opposing counsel will attempt to entice the advocate for the other side to waste his energies on issues of minor importance by challenging him to the conflict by boastful allegations and sarcastic insinuation. Let the advocate beware how he meet these insidious advances of the enemy. As a general rule it is best to ignore all irrelevant issues and to hold the mind of the jury to the main point at issue. If controversy is joined by counsel over points of minor importance the minds of the jury are diverted and the value of the main point unappreciated amid the resulting confusion. Hon. J. W. Donovan has well expressed the idea in succinct language, when he said: "The real winner, after all, is one who, with singleness of purpose, holds to his point, and hugs the issue to the end."[1]

[1] Donovan's Modern Jury Trials, page 213. In the connection in which this statement is made by Mr. Donovan, the latter illustrates it by relating the excellent and celebrated story entitled, "Kill the Squirrel," which appeared some time ago in *Harper's Weekly* and which furnishes a profitable lesson to the law student. The story relates the experience of a lawyer in selecting a clerk. The lawyer put a notice in an evening paper saying he would pay a small stipend to an active office clerk; next morning his office was crowded with applicants—all bright and many suitable. He had them wait in a room till all should arrive, and then arranged them in a row and said he would tell a story and note comments of the boys, and judge from that whom he would engage.

"A certain farmer," began the lawyer, "was troubled with a red squirrel that got in through a hole in his barn and stole his seed corn; he resolved to kill that squirrel at the first opportunity. Seeing him go in at the hole one noon he took his shotgun and fired away; the first shot set the barn on fire."

"Did the barn burn?" said one of the boys.

The lawyer, without answer, continued: "And seeing the barn on fire the farmer seized a pail of water and ran in to put it out."

"Did he put it out?" said another."

As he passed inside the door shut to, and the barn was soon in full flames. Then the hired girl rushed out with more water—"

"Did the hired girl burn, too?" said another boy.

The lawyer went on without answer—"Then the old lady came out, and all was noise and confusion, and everybody was trying to put out the fire."

"Did they all burn up?" said another.

The lawyer, hardly able to restrain his laughter, said: "There, there, that will do; you have all shown great interest in the story;" but, observing a little bright-eyed fellow in deep silence he said: "Now, my little man, what have you to say?"

The little fellow blushed, grew uneasy and stammered out: *"I want to know what became of that squirrel, that's what I want to know."*

"You will do," said the lawyer. "You are my man; you have not been switched off by a confusion and a barn's burning and hired girls and water pails; you have kept your eye on the squirrel."

As Mr. Donovan suggests a whole chapter is given in this story. It is packed full of excellent advice to beginners with a few good hints to older advocates. In every suit there is, or should be, one squirrel to kill, and no more.

CHAPTER XIV.

BRIEFS, ARGUMENTS AND METHODS OF SPEAKING.

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§ 160. **The Lawyer's Brief—Its Requisites and Value.**—A very important part of a lawyer's work is the preparation and submission of briefs for both *nisi prius* and appellate tribunals. The former, how-

ever, are hardly more than memoranda of authorities; the latter present the entire case to the appellate tribunal and the advocate fails or succeeds there wholly on the weakness or efficacy of his printed brief. Nothing is more important therefore than a perfect brief.

The different parts of a brief vary in some particulars in the different states. The statutes and the rules of court must always be carefully consulted. Most usually, however, the different parts of the brief are as follows: First, abstract of the record; second, statement of the case; third, assignment of errors; fourth, points and authorities; fifth, argument; sixth, index. The order of the various parts may be changed, but the order here given is universally recognized as the most perfect and logical.

The abstract of the record should be full, but not verbose; accurate, but clear. Clearness and brevity are the two most necessary qualities. The purpose of the abstract is to make the important evidence easily accessible to the court. It is therefore always advisable to have the abstract *sub-headed* throughout, showing at a glance where the testimony of one witness ends and another begins; and every other resource of printer's ink and of wise arrangement should be taken advantage of to make the abstract attractive to the court—something it very seldom is. Such an abstract will invite the attention of the court where a voluminous, unintelligible and slovenly printed one will repel an investigation even on the part of a most painstaking and conscientious judge.

The statement of facts in a lawyer's brief ought to test the strength of his case. In the facts lies the justice of the cause. The best case can be so ob-

securely stated as to conceal its merits; and the weakest can be so plausibly stated as to make a first good impression. A famous writer says that every cause has a bad side; and it may be affirmed that the worst of causes has at least one good side. The art is to make the best of your case.[1]

The assignment of errors is simply a copy of the points submitted as grounds for the motion for a new trial. The points and authorities is a short digest of the law of the case, citing all the authorities sustaining the various points of law on which you desire to insist in the argument. Here the statements of the legal propositions should be short and succinct and so carefully worded as to evidence at once a direct connection and bearing upon the facts of the particular case. In the written argument insistence should be laid upon the most important points, which again should be arranged in the order of their force and conclusiveness on the advocate's case, the most important point of all coming last. The index also is

1 "An eminent member of the bar," said Judge Daly, of New York, "told me that from the beginning of his practice he had made this part of his brief a special study, when presenting a case to an appellate tribunal or to a single judge; and that the first compliment he received from the court was for his statement of the facts of a most complicated case. He had devoted great care to arranging the array of particulars so as to make the comprehension of the facts as easy as possible, and he was told that it was mainly his statement of the facts that won the case, a compliment that gave intense satisfaction to a young practitioner. It was this gentleman's belief that success in appeal cases largely depended on a clear statement of fact in the brief. It is undeniable that if such a statement is lucid and convincing and impresses the court with the justice of your cause your argument on the law will be greatly aided. In a case doubtful or novel as to the legal questions involved, doubt is certain to be resolved on the side of substantial justice."

not to be slighted, as it too often is. The advocate must remember that the judges are men and will always take the path of the least resistance in arriving at a decision. He should be careful, therefore, that his opponent's brief, by its clear and logical arrangement and its complete and exhaustive index, does not offer a more accessible avenue to a knowledge of the case than his own brief.

Before passing to the last requisite of a good brief, we desire to reiterate the emphasis we have already placed upon the general characteristics of an ideal brief, *i. e.,* clearness and brevity. It is, indeed, a pleasure for a court to take up a brief and find everything in such shape that they are enabled to gain a complete idea of the whole case by simply glancing through its pages and find the statements therein contained so clear that a second reading is never necessary. And brevity is even more important. A glance through the decided cases will show how often courts have condemned the practice of submitting voluminous briefs, and in some cases have stricken them from the files. There is absolutely no occasion for a brief to exceed one hundred pages. We make this statement advisedly after consulting more than five hundred briefs filed in our state and federal courts. In most instances they need not exceed fifty pages. If the abstract of the evidence is necessarily large by reason of some rule of court requiring all evidence to be set out in detail or under some statutes permitting what is called the "short form" of appeal, that is, without filing a transcript, the abstract should be published separately and carefully sub-divided, sub-headed and indexed.

With respect to the compositions of briefs and

points submitted to the court, so far as literary style is concerned, and whether any impression is made by care in that respect, it may be inferred that the substance, rather than the form, of a brief is the thing considered by a judge. This is not necessarily because of the great pressure of business and the little time left for dwelling upon matters of mere style, for it is the duty as well as the inclination of a judge to look at the counsel's law and not at the manner in which he states it; yet it must be evident that form of expression can add much to the force and impressiveness of a statement. The opinion of learned judges often shows this. One is particularly happy in his choice of words; and another, less so.[1]

§ 161. **Addressing the Court—Requisites and Value of Oral Argument.**—Whether a court can be influenced more by clear, original argument than by the mere citation of authority, we do not believe to be at all doubtful. All courts, the members of which lay any claim to legal ability, favor an oral argument of counsel in preference to the dry citation of authority in printed briefs.[2]

[1] "A strong opinion," says Judge Daly, to quote again from an address delivered by this learned judge, "is one containing law and reason, plainly stated in the most forcible way; while an equally sound utterance may be weak, because lamely and insufficiently delivered. It is not, however, to be denied that a lawyer's training for his profession is not complete until he has so mastered the form of expression as to present his statements with directness, nor until he has acquired a vocabulary extensive enough to give every shade of meaning and the art to use it for substantial ends and to the best effect."

[2] Mr. Justice Harlan, of the United States Supreme Court, has this to say: "It is a matter of serious regret and concern that the practice of oral argument appears to be falling into disuse. The

It is of great advantage to the court itself. The opportunity to interrogate counsel frequently leads to a better understanding of the nature of the cause, and clears up many doubts. The English reports show that even in the House of Lords the argument of causes frequently assumes the character of a running oral debate between court and counsel. In this way a great many specious shams are pricked and exploded; the judges arrive at a better understanding of the cause, and counsel are maintained in habits of honesty, which they are liable to fall from under the dark lantern system of "submitting" causes on briefs; briefs which are sometimes concocted in a spirit of deceit and falsehood and which are very often unintelligible. We find, therefore, that the peculiar value of oral argument lies in the fact that the court and counsel are able to pick to pieces the authorities and probe the reasons of the law as applicable to that particular case. But it is in such cases that an attorney may well quail before the quizzing of the court where he has no more intimate acquaintance with the law of his case outside of the decided cases.

In the preparation of points for the court, certain rules may be observed: The first rule is that the printed or written brief is to be submitted *after* the

idea seems to have become general among members of the bar that we prefer arguments presented in the form of written briefs. Such is not the case. There are many times when nothing can take the place of the personal presentation. Briefs are well enough in their way, but it very often happens that the real point upon which a case turns may be overlooked in a brief, while an oral argument may serve to bring it home to the court. A special emphasis, a striking simile, may throw new light on an intricate problem, and perhaps reverse a judgment in the mind of the court."

hearing, and should, therefore, be an amplification of the oral argument. The latter should be condensed as much as possible, the former may be as full as the advocate pleases. The oral argument should not deal with details nor too many particulars. These should be found in the brief if the court cares to look for them. The second rule is, if there are many points to be submitted, that the chief ones only should be selected for oral presentation. The advocate should spread the others on the points, but himself—if the colloquialism is permissible—on one or two of the best. The third rule is for the advocate to cultivate an intimate acquaintance with the elementary legal principles underlying his case so that he may make the *reason* for a decision of the particular case in his favor, so evident that he compels an instant acceptance of his position by every member of the court. Only one thing should be left for the court to do after the advocate has finished—the work of finding authorities to sustain the preconceptions which the advocate has already aroused.

§ 162. **Addressing the Court—Discussion of Principle versus the Citation of Authority.**—A lawyer's address should not be, as it too often is, a mere digest of the authorities on the point of law involved in the particular case. A clear and thorough discussion of the legal principle underlying the decided case is undoubtedly of greater value. True, the tendency of American lawyers, at least, is to dispense with any original research into the principles of the law applicable to the particular state of facts and to rely too strongly on the authoritative utterances of other tribunals. It may be that the press of litigation at the present time offers very little time even where

there is the inclination to reach independent conclusions by original methods of reasoning and research. And undoubtedly, also, the courts lend some encouragement to the practice. It certainly seems, sometimes, that all an attorney is expected to do on a question of law before the court is to cite a few cases apparently on all fours with his own and demand a decision, and where the authorities seem to be overwhelmingly in favor of a certain proposition the court is not even expected to reason about it.[1]

But a court is not always unwilling on a difficult or novel point to altogether disregard the authorities and consider the question as *res nova*.[2] Under such circumstances a court is not made to feel that it is being bluffed, coerced or crushed by any "weight of

[1] Mr. Bishop says that there are enough of these questions on which the authorities seem to be uniform, but which are decided incorrectly on principle, and in regard to which anxious and eager litigants have been discouraged by "big" lawyers, to keep in comfortable circumstances many of the younger generation in the profession who sometimes find the struggle for existence too intensely engaging.

[2] One of the justices of the New York Supreme Court is reported as giving voice to the following striking sentiments quite pertinent to this question: "I have not deemed it necessary to cite authorities in support of the views which I have expressed. It is enough that they must commend themselves to the rational mind. It seems to be considered in some quarters that judges should not think any more on their own account; that they should spend their lives mousing through mouldy libraries in search of what other judges in a less enlightened age have said, not even upon the immediate question in hand, but upon some matter more or less distantly related. It is thought to be presumption to let one's own bucket down into the living well of reason, instead of being content to lick up from the muddy, trampled earth around it the green and stagnant leakings of the past. And so the science of law, which was once deemed the perfection of human reason, is being left behind by every other science."

authority" into making its decision, but on the contrary feels an added dignity when counsel approach them as the equal of any other court, and, by indulging the presumption that the case under review is *res nova,* request a decision on reason and principle, rather than demand it on authority. Indeed, it is not an extremely rare occurrence for an attorney appearing before a court almost bankrupt as to authorities, and thus compelled to rely altogether on reason and principle to win his case over his apparently more fortunate opponent, who had satisfied himself with nothing more than the preponderance of authority. Of course, we do not mean to convey by this that in every case where the authorities preponderate reason and principle would dictate an opposite conclusion—on the contrary, they will generally be found together; but, since it is human to err, there will be found instances, not a few, in which principle and reason have been lost in confusion or prejudice. Out of the latter and back to the former the diligent attorney may lead the court by a clear conception and forcible statement of what the true rule ought to be. In such cases the unprejudiced mind of the court is always ready to follow.

§ 163. **Addressing the Court—Interruptions by the Court.**—Where an attorney addresses an appellate tribunal he must remember that he is addressing minds trained to pierce at once to the heart of the case and impatient to reach the point decisive of the dispute. One-half the cases of interruption and anticipation of arguments by the court are due to too much circumlocution and preparation of counsel in approaching the point of the case. Judges are not peculiar in this respect. The advocate would not expect

a business man, upon whom he called with a proposition in favor of which he hoped to impress him, to listen to his way of unfolding it, if he thought of a more direct way of getting at what he wished to know and put at once his pointed questions to that end. He would, on the contrary, be glad to advance his statements in the direction in which the inquirer's mind opened to receive it. And he would feel that after he had satisfied him by a full discussion on the points that first occurred to him, leaving him to weigh his arguments at leisure he could safely and profitably urge every minor reason in aid of them, confident of an indulgent auditor. There is every reason, therefore, for the young practitioner not to feel disconcerted at interruptions by way of inquiries from the bench. They serve to show where the strain of the case comes and where his greatest exertion must be made.

§ 164. **Addressing the Jury—General Considerations.**—Turning to the consideration of the best method of presenting a case to a jury, it must be apparent at once that a different rule is to be observed from that which applies in arguing a point before a court. There is a much greater latitude of observation in discussing a question of fact than of law, and a different method must be pursued in convincing minds not always trained to reason closely upon any subject nor capable of close attention.[1]

[1] Dr. Johnson's advice to counsel, arguing before a legislative committee, might be urged with respect to addressing a jury: "You must not argue there as if you were arguing in the schools; close reasoning will not fix their attention; you must say the same thing over and over again in different words. If you say it but once, they miss it in a moment of inattention. It is unjust to censure

Here is the marked difference in addressing a court and in addressing a jury. With the former the advocate begins with his strongest point because the judge, with his training and experience, sees the point of the case at once and his mind refuses to be diverted until the point is fully discussed. But the juryman is desirous of taking the case as the advocate presents it. He soon loses interest in it if the latter does not begin in a manner to attract his attention and continue with matter both direct and pertinent. The advocate has, therefore, to gain his attention; but, in order to make the most lasting impression he should begin with considerations of lesser weight, increasing the strength of his arguments as he goes on, and reserving his most convincing for the close. This is and always has been the art of oratory. It is the dramatic method by which all oratorical effects are achieved. The interest of the hearer is excited, and the chief point is made when his attention is riveted upon the subject. It is not ineffective to begin with a rather weak argument. If the advocate perceive that his auditor sees the weakness or the fallacy of it, he has gained his point in securing his attention and he is ready to appreciate the better considerations he is next to urge.

It is sometimes necessary to address jurors that are not only inattentive but also hostile. How, with-

lawyers for multiplying words when they argue; it is often necessary for them to multiply words." Referring on another occasion to the course which counsel should pursue in arguing at the bar of the House of Commons, Johnson said: "You must provide yourself with a good deal of extraneous matter which you are to produce occasionally so as to fill up the time; for you must consider that they do not listen much. If you begin with the strength of your cause, it may be lost before they begin to listen. When you catch a moment of attention press the merits of the question upon them."

in the limits of an ordinary summing up, to convert such auditors is the problem for the jury lawyer.[1]

§ 165. **Addressing the Jury—A Temperate Style Before a Jury.**—A temperate style is always more effective than a noisy one. A verdict is never ob-

[1] "I recall with admiration," says Judge Daly, "the manner in which this was done in a trial I witnessed. The case was for rent upon the lease for one year of a suburban cottage, and the defense was fraudulent representations that the locality was healthful, whereas it was a chills and fever district, and the tenant, having relied on the representations and signed the lease, went into possession, and the whole family, domestics included, having enjoyed sitting out in the moonlight for some weeks, were all laid up with malaria. The landlord denied the representations, but his claim of four hundred dollars for his year's rent seemed in great peril after the tenant and his witnesses had finished their tale of woe, for the twelve jurymen, and one sympathetic juryman in particular, regarded the landlord and his witnesses with evident distrust. The case went to the jury upon the issue whether or not such representations had been made. It was oath against oath, and the lessor's counsel had nothing to suggest but the improbability that any business man would make such representations and risk his whole rent upon the result. I shall never forget the ingenious manner in which the counsel opened his case. It was a discouraging thing to rise and face the lowering regards of eleven jurymen. I say eleven, because the twelfth juryman, the sympathetic one, declined to look at him at all, and deliberately turned in his seat so as to present his back to the counsel as he got up to plead the cause of the hated landlord. He was like the member on the committee, he had made up his mind. The counsel rose with the written lease in his hand, which he slowly unfolded and held out to the jury. 'Gentlemen,' he said, 'look at this paper. What would you call it? As plain business men you would frankly answer that it is a lease. Oh, no, gentlemen, it is quite a different instrument if the defendant prevails here, for according to him it is a policy of insurance by which my client for the sum of four hundred dollars guarantees the tenant and his wife, and his children and his servants against any kind of sickness for a whole year, and gives him in addition a house to live in!' The twelfth juror was so impressed with the novelty of this view that he turned round to hear more. He came round in fact figuratively and actually, and the landlord got a verdict."

tained by noise; foam has no weight, fury of language no force. Still, it is not intended for a moment to suggest that a conversational style is powerful; on the contrary, an advocate might as well attempt to fire a bed of growing rushes with a piece of tinder as rouse a jury with a feeble speech. Bad speaking is infinitely worse than silence. Let the facts speak at all events. But a roaring style never persuades; it only astounds if it does not stun. Juries generally endeavor to do what they believe to be right, and to decide justly; but the danger of this excellent quality is, that their desire to do what is just often leads them to an unjust conclusion. They set up, as they think, a kind of natural justice amongst themselves, as though they should have a common standard of height for all mankind, which would produce, undoubtedly, much painful stretching, or undue stooping, if all were forced to meet it.

This natural justice, unfortunately, is neither law nor equity, and generally inflicts injury on both parties to the action, as the boys did who divided the bellows that each might have a share. The advocate who knows that his client's rights are inconsistent with this natural theory must convince the jury of their error and bring them to a more accurate perception of the merits of the conflicting claims. This is not to be accomplished by declamation, but by the exercise of the reasoning faculties. The advocate must clear away not only the theory which they have constructed, but the basis on which it rests. Here is work for—first, his perceptive faculties and then, his argumentative. And beyond question he must clearly ascertain what their idea of the merits of the case is. Among charlatans this process would be called

"thought-reading:" with advocates it is merely the exercise of common sense—a process of reasoning based on a knowledge of human nature.

§ 166. **Addressing the Jury—Winning the Master Mind of the Jury.**—A skillful and experienced advocate will quickly perceive the master mind of the jury, and to him he will first address himself. Nor will he be long in ascertaining whether he has made an impression or not. If he succeed, he need not trouble himself very much about the rest, unless there are those on the jury who have prejudices against his case. If there are, these prejudices must be attacked, and if possible beaten down, for it will not be sufficient to enlist the intelligence of one or two minds against the prejudices of others. Intelligence and prejudice are the two master influences on the jury. If there be no prejudice the advocate wins by convincing the best mind. If he cannot gain the strongest he should try and secure the weakest, for if he succeed here he will not lose his case. When trumps are out, the weakest card may take the trick, and the advocate has as much right to win with an uneducated Hodge as with a philosophical Mill. The jury are there for him to gain over to his side if he can by fair and legal argument, and by presenting his case agreeably to their minds and sentiments.[1]

[1] The advocate should not be dismayed at seeing the eyes of one juror closing in slumber or another studiously avoiding his gaze. Let him speak clearly, agreeably, forcibly and with a deep conviction of the truth of his utterances, and it may be said of him, as of James Scarlett (Lord Abinger), the great verdict winner of England, that he possesses a machine by which he can make the heads of jurors move vigorously up and down in the plane of the perpendicular, while his adversaries have only an imi-

§ 167. **Addressing the Jury—"Oratory" Before a Jury.**—One great evil to avoid, if an advocate would be understood and appreciated, either by a common jury or a special, is *fine talking.* Fine language will not stand the wear and tear of an ordinary *nisi prius* contest, and nowhere (except in the ears of a romantic female) is it so powerful and effective as good, well-chosen, homely words. It is as unnatural as the spangled dress of the acrobat, and as utterly unfitted for the ordinary business of a work-a-day life. One has often seen advocates mystify their meaning in phrases which were more like a girlish novelist's hysterical utterances than the sound language of a man and a scholar. It will take a good and gifted speaker a long time, and will require a great deal of practice, before he can venture to embellish his address with the figures or the fancies of rhetoric; indeed, the most gifted and the most finished speaker will only use them in a limited manner; profuseness of ornamentation, like a redundancy of words, being at all times more calculated to obscure the meaning than to elucidate it. Above all things, affectation should be avoided; every listener detests it, and cannot help feeling some degree of contempt for the person who indulges in it. Affectation is a weakness even with strong minds, and although it is sometimes tolerated in a clever man, it is never admired; when an ordinary individual indulges in it he is—simply despised. At the bar, except in rare cases, the higher gifts of oratory are out of place; it is a limited field; it has its beaten tracks, and along these men must travel. Ora-

tation device which induces the jurymen to move their heads slowly from side to side.

tory is not one of its paths; in other words, attempts at what is commonly called oratory are to be avoided. What a figure an advocate would present who should attempt the flights of Burke or Webster in a "running down" case! The Republic is not at stake in every trial; and a pickpocket may be defended, at least up to conviction, without a severe onslaught on the Constitution.

§ 168. **Forensic Eloquence—Its Value and Requisites.**—Those who would discourage true eloquence at the bar fail to understand what it means. It has been defined as the art of clothing thoughts in language and uttering them in such a manner as is adapted to producing conviction or persuasion. Can this art be eliminated from forensic discussion with advantage? Will it facilitate the business of the courts, and save time, to disregard those rules by which legal points are lucidly stated and facts are impressively presented?

When we speak of eloquence, we do not refer to words without ideas, but to the embodiment of ideas in words which make an impression commensurate with the thought. The immortal lines of Shakespeare teach us what undying power dwells in the form of words. He was the master of expression, and he showed that inspiration is discernible not only in the conception of the idea, but in the shape in which it is presented to the world. The power which gave to airy nothings a local habitation and a name, united thought and phrase in an indissoluble union and rescued even the commonplace and the trite from contempt and neglect. When we have thoughts to convey, our study should be how best to present them to

the world; how to say what is in our minds so that it shall impress others as it impresses us. To be clear, persuasive, and convincing—this is to be eloquent. And no lawyer can afford to be without this art, or need be apprehensive that the study of it is time thrown away.

It is no objection to the study of real eloquence, that the courts are now so hurried that judges have no time to listen. There is no record of any period when courts were not pressed for time. There never was a period when judicial haste did not pause to listen with respect to a well stated case. The object of eloquence is to command attention in the pressure and haste of affairs. To arrest attention—that is the first step; to give a clear description of the point at issue, is the next step; and to advance with cogency the arguments in the speaker's favor, is the conclusion of the task.

The next thing to observe is to be logical; without this the advocate will not be even intelligible. Some things he says may be understood, but his address generally will be a jumble of words and a confusion of ideas. Of course, it is not meant to imply that the plaintiff must put *both sides* logically; by so doing he may reason himself out of court. It is his *own case* and it matters little whether the advocate is addressing an educated or an uneducated audience: the mind is a reasoning machine, and it will the more readily grasp arguments that are put logically than those which are presented with unnatural distortions of premise and sequence.

§ 169. **Forensic Eloquence—Genius or Hard Work as a Requisite.**—The modern decline in oratory is often

mentioned, always deplored, but seldom accounted for. Political campaigns, together with the pulpit and the bar, afford the most available fields for the cultivation of this talent; yet every observer, however superficial, knows that the best living representatives of these three departments of public speaking are not the equals of Wendell Phillips or Henry Clay, Matthew Simpson or Henry Ward Beecher, Rufus Choate or Daniel Webster. This deterioration has not resulted from any radical change in the standards of public taste. Were Webster to appear among us to-day, he would draw as vast audiences and sway men as absolutely as in the meridian of his genius and power. The real explanation is, that we have forgotten the time-worn truism, "*Poeta nascitur, orator fit,*"—"The poet is a poet born, *the orator is the result of education.*" The very eminence of the great orators of the past falls in with our natural indolence and seems to disprove the truth of this adage. We see only the finished production, the superb oration. We do not trouble ourselves to look behind the scenes and see how this grand spectacle was created; the headaches and heartaches, the routine labor and painstaking care which were factors in its composition. We have no difficulty in believing that the story of Aladdin's lamp was all a fable and that the vast buildings which ornament our capitals were built prosaically by ordinary men, who laid beam upon beam, brick upon brick, until all was completed. We may even understand how a coral reef is formed, not in an hour, but through centuries, by the tireless working of minute insects. But when we approach a great oration, sermon or legal argument, we are more credulous than children who believe the tale of Aladdin with as firm faith as they accept the story of

Noah and his Ark. We can scarcely conceive that the discourse is anything less than the inspired utterances of genius, born without labor and spoken without premeditation. It is this false and absurd idea which deters men from cultivating the moderate ability that is theirs and which makes great orators rare. Books have been written and lectures delivered, attempting to show how the art of oratory may be acquired, but the subject is too often overlaid with technical rules and distinctions. The student is bewildered in the mass of details and readily settles back into his original opinion that orators are born and not made.[1]

[1] The ordinary lawyer will point to Rufus Choate, to Daniel Webster, to Mat. Carpenter, to Thomas Erskine, to Charles O'Conor, and attribute their success as advocates to inborn genius, rather than constant, diligent effort. But a glance at the lives of these great men will convince one of the vast importance of hard work in the shaping of their successful careers.

Rufus Choate worked harder than any distinguished American lawyer and advocate, of whom we have a record. He labored faithfully, to have a profound knowledge of the principles of law and of the current decisions of the courts; he read general literature and the classics, to enrich his mind and improve his diction; he studied the dictionary, to enlarge his vocabulary; he constantly practiced the art of public speaking, and for forty years, let no day pass without drilling himself as to the proper method of addressing his fellow men. He concentrated his mind upon the trial of every case in which he was engaged, and whether it was great or small, devoted the whole strength of his intellect and all his skill and energy to a proper presentation of it to court or jury. He paid close attention to the examination of witnesses, and made copious and exact notes of their testimony; he studied the notes carefully during the intermissions of court, so that he might utilize them the better during the argument; he studied the faces of his jurors to learn the workings of their minds; he made careful preparation during the progress of the trial for the argument, and when the time came to address the jury, labored with both mind and body to convince them of the correctness of his position. In the ardor

§ 170. **Forensic Eloquence—Mental Absorption and Concentration.**—Our orator, who is determined to "speak well," next applies his mind to that vital part of his labor, the discovery of points upon which to discourse. It is an unpardonable affront to judges and juries, and ruinous to the reputation of a speaker to rely upon vehemence and rhetoric when substantial questions of life and property are at stake. Call it meditation, invention, construction of arguments, or what you will, it is the frame work on which all else depends. It consists in delving to the heart of one's case and extracting weapons for attack and arms for defense, jewels and gold for beauty and

of his speech, he would frequently come down on his heels with a force that would shake the whole courtroom.

The same is true of William Pinckney, one of the most remarkable and distinguished advocates of the country. He was indefatigable in his search for legal knowledge. "He approached every new case with the ardor and zeal of one who had still his reputation to earn." His biographer states that, "He was never satisfied with exploring its facts, and all the technical learning which it involved. In preparing his speeches, whether for the forum or the senate, he was equally unsparing of toil. All his life he declaimed much in private, and he carefully premeditated, not only the general order of his speeches, and the topics of illustration, but also the rhetorical embellishments, which last he sometimes wrote out beforehand. To supply himself with these, he noted in his reading every allusion or image that could be turned to use. He piqued himself on his critical knowledge of the English language, of whose structure and vocabulary he had a minute knowledge, if not a thorough mastery. Being mortified, when in England, by his inability to answer some question in classical literature, he resumed his classical studies, and put himself under an instructor to acquire a better knowledge of ancient literature."

Mat Carpenter was a prodigious worker and toiled late into the night while engaged in his cases. Charles O'Conor was a marvel of industry, and it is said of Emery A. Storrs, that in the "preparation of his legal arguments before a jury, it was his custom to spend the entire night while the trial was in progress, studying all the evidence that had been presented during the day."

adornment. But without one great prerequisite the advocate will discover nothing, and that essential is, concentration of thought. This mental absorption must be secured, whether by practice in steady reading and thinking, the study of mathematics or the writing of essays; *but it must be secured.* If the mind plays one moment and works the next, if it glides off into day dreams and is restive until it ceases from its labor, the process of digging into the subject will yield no results. The treasure often lies deep and the blows of the pick must be constant and pertinacious, stroke on stroke, time after time, monotonously and

John Philpot Curran, the distinguished Irish advocate, is a good example of the remarkable results to be obtained by patient, persistent effort. He had few of the natural attributes of a forensic orator. He was awkward in manner, was small in stature and had poor articulation. At school he was known as "Stuttering Jack Curran." On account of a failure in the first speech he attempted to make in a debating society, he resolved to overcome so far as possible his natural defects, and become a public speaker. He diligently followed a course of literary studies, and became passionately fond of the classics. At the same time he studied the French language and was indefatigable in his efforts to perfect himself as an orator. William Matthews says of him: "Constantly on the watch against bad habits, he practiced daily before a glass, reciting passages from the best English orators and authors. Speaking often in debating clubs in spite of the laughter which his early failure provoked, he at last surmounted every obstacle. 'He turned his shrill and stumbling brogue into a flexible, sustained and finely modulated voice; his action became free and forcible, and he acquired perfect readiness in thinking on his legs. in a word, he became one of the most eloquent and powerful forensic advocates the world has seen."

A further examination into the lives of eminent forensic orators must convince us that the average trial lawyer can greatly improve his skill as an advocate by diligently endeavoring to emulate the masters of the art. It is more largely a matter of industry than of genius.

stubbornly in one specific spot until it surrenders its riches.

§ 171. **Forensic Eloquence—The Value of a Personal Inquisition.**—A glance at the advocate's theme may reveal to him some valuable points lying upon the surface. He should observe them well, distrust first appearances and be fully convinced that they are reliable before he accords them his hearty support. When the subject has ceased to emit its superficial gleams, then commences his real labor, turning tails. The mind must be constantly and vigorously aroused by a system of catechising. We will, if the case involves the constitutionality of a statute, ask ourselves, "Who are the parties to this cause? Does the fact that a foreigner claims a right under the United States Constitution suggest any argument to us in support of or against the law? How has the person, who claims he has been injured, conducted himself with reference to this law? Did he assist in its passage? Did he accept benefits under it which make it unfair for him now to question its validity? Has he in any manner occupied a position inconsistent with the one he now holds? What motives actuate him in attacking this enactment? Again, when was the law passed? Was it at a time when party feeling ran high or national disaster seemed imminent? Was it called forth by some sudden emergency or was it the slow growth of a long-felt need? What was its pedigree? Was it the first of its race, or had it a lineage extending back through many years in the history of state legislation? How have its predecessors been treated by the courts, the legislatures and the people? What consequences would

follow if the law should be declared invalid. What would result if it were upheld? What has been the practical operation of this law?" Throughout the examination of his topic he must hold tenaciously before him the ultimate point he wishes to make, namely, that the law is good or that it is bad. Whenever he loses sight of this goal, his investigation will be halting and ineffectual.

If the question in his case is not one of law, but arises upon the facts, he will pursue much the same method, by questioning himself freely concerning the parties to the suit, their circumstances, age, sex, race, financial and social condition, motives, occupation education, place of residence, interest or lack of interest respecting the transaction in question. From some or all of these inquiries he may derive arguments to establish or refute the point in issue. Then he will turn to the transaction itself, the murder, robbery, contract, boiler explosion, railway accident, slander or whatever it may be. He will ask himself when, where and under what conditions did it occur? By what means? In what manner? What were its effects? Was this the first occurrence of the kind, etc. These and similar questions must be put until the capacity of the case as a well-spring of proofs is exhausted. It does not follow that he will employ all the arguments his industry or ingenuity discover. But there is need, first, to lay all of them bare; the shifting of the weak from the strong may readily be performed at a later stage.

§ 172. **Forensic Eloquence—How to Meet an Attack.** —Thus far the advocate has assumed the aggressive,

but this is only half of his duty. He is attacked, and must refute and parry the arguments of his adversary. Sometimes the case itself will suggest the arguments of law or of fact which the latter will probably advance. In other instances the advocate will need to examine the facts critically from his standpoint to determine what points will be relied on to support his opponent's contention, and prepare to meet them. He will take up his own arguments, one after another, and, assuming that the first is fallacious, will ask what answer he can make to the conclusion drawn therefrom by his opponent. In still other cases he will be forced to await his adversary's argument to discover his points, and reply upon the instant as well as he can. If the advocate is able to show that a certain argument of the opposing counsel is inconsistent with another, that it is inequitable and should not lie in his mouth to advance a third, that a fourth point makes for his side of the controversy rather than in favor of the opposition, that a fifth is not supported by the facts, a sixth is contrary to sound public policy, common sense or the decisions of the courts, and that a seventh is against the spirit and purpose of the law, he will render invaluable service to his client, for the sapper and miner are as necessary in a siege as the footsoldier or artilleryman.

§ 173. **Forensic Eloquence—Discussion of Adverse Authorities.**—The opposing counsel will cite the adjudications of the courts to disprove the advocate's legal position or to establish his own. The advocate's duty will then be to distinguish his authorities from the case in hand. He will point out, if the facts justify him in so doing, that his adversary's cases are

the decisions of inferior tribunals; are not recent; do not exhaustively consider the point in question; the court cites few authorities or none; the cases have been doubted or overruled by later decisions; they are inconsistent with other utterances of the same court; the statements bearing upon the controversy at bar were not necessary for the decision of the point then before the court and hence are mere *obiter dicta;* they are the decisions of a divided court in which there was a strong dissent; their facts differ in a material regard from those of the present suit; the case was a political decision and, being the outcome of partisanship, is not entitled to controlling weight; it was decided at a time when the views of the public differed radically from those of the present day, and the case is therefore no longer applicable to our times. Finally, if none of these avail the advocate should boldly declare the law to be erroneously stated in the decisions cited and, appealing to the sound discretion and manly independence of the court, urge the judges to act upon the question as they would upon an original inquiry, untrammeled by precedents or authority.

§ 174. **Forensic Eloquence—Order, Arrangement and Peroration.**—The advocate, still holding clearly before him the ultimate point he wishes to establish or destroy, and with an array of lucid, cogent arguments derived from the case by concentrated inspection, takes the next step towards "speaking well." He arranges his matter in the best possible order. There are some minds so logical by nature that they need only begin the composition of a speech and they cannot but elaborate their argument according to the most telling plan. With the majority of men, however, there is need of a written outline, with points

separately numbered. These must be transposed and re-transposed until the arrangement appears rational and forceful. It has been aptly said that in every discussion there is always something that is *naturally first*, and it is generally true, also, that there are always arguments which are naturally second, and third, and fourth. The advocate should be well assured; the probabilities are that the order of arguments and points which he originally frames is not the best natural order. His mind will cling to a wayward fancy for its first born scheme of argument, either because it is too indolent to change its plan or because of a law of our being that whatever is new is likely to please us. He will cause himself mental pain by destroying that outline and transposing the parts. But he must learn to tyrannize over himself and buffet these predilections and groundless preferences until his calm and deliberate judgment approves of the arrangement which he has adopted, even though it be the reverse of his original scheme.

Only the most general suggestions on arrangement can be given, for every cause is peculiar to itself. Some delicate and very natural compliments to the court or jury, an appropriate reference to the importance and interest attaching to the case, a brief mention of the persons engaged in the litigation or of the place or time of the trial, may be the first words the advocate utters, and they should gradually glide into the body of his discussion. If he speak after his adversary, a strong commencement is secured by opening with the sentiment which the latter used in closing or with one emphasized by him during his argument, turning it into a weapon against him and thus utilizing it both as an introduction and an argument.

In marshalling his points, the advocate should never begin or close with one that is weak. While his judgment and sense of propriety must determine the procedure in every instance, as a general rule it is better to place doubtful arguments in the middle of a speech, a strong point at the beginning and the strongest at the close. The feeble ones will then derive strength from their surroundings.

The advocate should not hurl at the judges or jury all the arguments he has conceived. He should let many of them go, especially those which are finely drawn, scholastic and such as would appeal rather to an audience of students and professors than to plain, practical men. If he do not dare omit his weaker points, then mass them, project them in a body, one after another in quick and brilliant succession, that they may obtain, in combination, a force and effect which they are incapable of producing when taken singly.

If the advocate defend against an attack, his method may be the exact reverse of that suggested. He may separate the weak arguments advanced by his adversary and refute them one by one, thus making the destruction of his citadel easier when all the redoubts and outposts have been captured. On other occasions the advocate's common sense may direct him, in the first instance, to throw all his weight upon his strongest point and, having beaten it down, take up his minor contentions and dispose of them with greater ease and dispatch. Here, as everywhere, he is to remember that the order in which he finally arrays his arguments is not always that in which they first occurred to him. It is the *best* order he must use, not the *easiest.*

In closing, it is well for the advocate to sum up the entire argument upon his side if the case is at all difficult, and then bear strongly upon the equitable features of the controversy. If the advocate has been contending for the letter of the law and has laid stress upon technical or, it may be, hard and repellant, arguments, he should demonstrate to the court or jury that his position involves substantial justice and fair dealing, equity and good conscience. The tribunal will be readier to give credit to the rest of his discussion if it believes that by its judgment or verdict, mercy and truth may meet, righteousness and peace embrace.

All parts of the argument must lead naturally and gradually into each other. Unless for effect, there should never be a violent and abrupt transition in the thought. The last sentiment the advocate has spoken should contain within it the germ of its successor, and melt easily and agreeably into the latter. This is acquired only through practice; but if, by a voluntary effort, he bring his mind to bear upon it while he speaks, its difficulties will soon vanish.

The surest and simplest methods for the advocate to master the art of perfect arrangement and graceful transition are to read and study the speeches of great orators, and to compose written discourses of his own, applying the foregoing suggestions, awkwardly and painfully at first, no doubt, but assiduously, until they come unbidden and he acquire that "instinct of skill" which is the consummation of all study. Having then said the things which the subject and the occasion call for and require, having said them as acceptably as he may, dealing with the salient, the strong, the vital points in his case, after thorough

preparation, then let the advocate achieve as he may the proudest and richest trophy of court-room oratory —and simply quit!

§ 175. **Elocution—Cultivation of the Powers of Speech.**—Elocution has much to do with forensic eloquence. Elocution is the art that deals with the manner in which we say things. In our matter of fact civilization we lay so much stress on the importance of the thing said that we care nothing for the way in which we say it. We ignore the art of elocution as useless to anyone except the schoolboy and the theatrical apprentice. The result is that we have lawyers of high reputation to whom it is anything but a pleasure to listen when they are addressing a court and jury.[1]

We, of course, would not advocate the cultivation of an unnatural style or manner, or recommend a course of study which would rob a lawyer of his individuality. Artificiality and insincerity are to be avoided by all means. But is there any good reason why a lawyer should not be able to improve by instruction and practice, his manner of addressing courts and juries, and at the same time retain his own distinctive individuality in gesture, tone and mode of utterance?

[1] The author had the opportunity of attending the argument of the famous suit of the United States v. The Northern Securities Company, which took place in the United States Circuit Court of Appeals at St. Louis in 1903. Several of the attorneys for the Securities Company and for some of the defendant railroads were absolutely monotonous. Their expression was frightful. They mumbled their words, and at the end of a long and involved sentence would allow their voices to gradually die away into a mere whisper—a very common error. The comparison of these dull, unimpassioned speeches with the electrical, sparkling, well-delivered address of United States Attorney Beck must have impressed even the court and have had something to do, probably, with their unanimous decision in favor of the government's contention.

Many lawyers are familiar with the "jury voice." Some lawyers talk to a jury in a loud tone of voice, usually in a high key, and, without modulation, go on monotonously, to the end, frequently wearing themselves out, as well as the jury. What a distinct advantage a lawyer with a good voice has! When properly handled, how it pleases, calms, arouses or thrills! Unemotional as we may believe ourselves to be as a class, a public speaker with a clear, ringing, well modulated voice can cause the blood to course through our veins, fill us with love, pity, fear or hatred, and impel us to a course of conduct that we never would have followed had it not been for the potent charm of the human voice. If such results can be obtained by the use of the advocate's vocal powers, he shall certainly at times be able to win a doubtful case by the manner in which he uses his voice.[1]

[1] Demosthenes, in the early part of his career, complained that with the utmost endeavor he could find no favor with the people. Satyrus, the actor, asked him to repeat a selection from Euripides or Sophocles. Demosthenes complied, and then Satyrus recited the same speech in such a way as to make it seem marvelous to Demosthenes. It sounded like an entirely different speech. Following the example set by Satyrus, and exercising the most painstaking care, he soon became the greatest orator of ancient or modern times.

Rufus Choate earnestly recommended the study of elocution. He made this statement in regard to it: "Elocutionary training I most highly approve of. I would go to an elocutionist if I could get time. I have always, even before I first went to Congress, practiced a daily sort of elocutionary culture, combined with a culture of the emotional nature I have read aloud, or rather spoken, every day, a page from Burke, or some such author, laboring for two things: to feel all the emotions of indignation, sarcasm, commiseration, etc., which were felt by him, and also to make my voice flexibly express all the changes of pitch and time, etc., appropriate to the fluctuation of thought. I have done this in my room, and therefore did not give vent to loudness or violence, but found great

§ 176. **Elocution—Imitation and Affectations of Speech.**—It is equally necessary to warn the young advocate against a very common and fascinating error—that of *imitation*. A really good advocate has a style of his own, and an individuality which would be utterly spoilt were he to attempt to blend it with that of another. To imitate a successful man's style is like a short man putting on a tall man's coat. However well fitted the one, it is sure to look ridiculous on the other. Style is born with a man as much as his mental capacity itself. Nor should it be forgotten that imitators, as a rule, adopt the failings and not the excellences of their models. Affectations of speech and mannerisms are what generally catch the eye of the imitator. Besides this, imitations are bad in themselves. As a rule, they are grotesque representations and little more than burlesques of the original. It is at once apparent that they are no part of the imitator's individuality, however well they may be done. It does not, of course, follow that the best advocates are not therefore to be accurately studied; it is servile imitation that is to be deprecated, not the careful observance of the graces and excellences of the best men. The smooth, unruffled demeanor, the courtesy, the polished ease, the unexaggerated eloquence, the order and arrangement of speeches, the skillful and subtle modes of cross-examination, the fearless independence of the masters of advocacy, should be studiously considerered. But wherever there is an extravagance of style, even though it may be fascinating in the advocate to whom it is natural, it should never be imitated. An imitator must of necessity be

range of tone possible, nevertheless. I constantly strove also to make my tones strong and full and the throat well opened."

a second or third-rate man, and is generally below even that. At the best he plays but a poor part, and his best imitation does him the least credit.

§ 177. **Danger of Achieving a Reputation as a Wit**—The advocate should avoid in his argument all attempt at witticism. Crack no jokes; tell no funny stories in the argument of the case to court or jury. The advocate will by his fun and levity undoubtedly entertain the jury—possibly the court; but that is not what he is there for. By his brilliant flashes of wit, and by his delightful humor, and by his really good stories—and they are the dangerous ones—he will excite an expectation in the jury for more fun after a while, and they will be impatiently waiting for something funnier still further on; while it is to the doubtful questions, the questions that need clearing up, that he should address himself; and he should by his own seriousness impress the jury that to him and to his client that case is a matter of grave and serious concern. The lawyer who achieves a reputation for being a funny man is doomed, so far as his advocacy is concerned; just like the sensational preacher is doomed when he has achieved the reputation of being sensational. He may build up congregations, but he will never build up churches—never did. You may win the applause and secure the verdict of that unsworn jury that sits without the bar; but when that sworn jury retires to the jury-room to consider his case, it will be the weightier matters and not the "mint, anise and cummin" of the case that will engage their thought.

§ 178. **Appropriate Physical Gestures and Facial Expressions in Speaking.**—Nothing is so cold and

clammy as an address of a speaker who, sphynx-like, looks at you without even one unnecessary wink of the eyelid, and rolls out his words like a phonograph without the least outward evidence of feeling. Facial expression and physical gesture, when used naturally and appropriately to the occasion, are tremendously effective in forensic pleading.

Appropriate facial expression is probably the most important outward evidence of feeling. The deep frown, the inquiring or sarcastic flight of the eyebrows, the fierce gnashing of the teeth, the contemptuous curling of the lip, the piercing flashes of the eyes —all these and possibly many other equally effective manipulations of the facial muscles, may very profitably be used to embellish the speech of the forensic orator.[1] Of course, these facial expressions must be

[1] In the days when Henry Clay was at his prime as a lawyer a man was once being tried for murder and his case looked hopeless indeed. He had without any seeming provocation murdered one of his neighbors in cold blood. Not a lawyer in the county would touch the case. It looked bad enough to ruin the reputation of any barrister. The man, as a last extremity, appealed to Mr. Clay to take the case for him. Every one thought that Clay would certainly refuse. But when the celebrated lawyer looked into the matter his fighting blood was roused, and, to the great surprise of all, he accepted.

Then came the trial, the like of which was never seen. Clay slowly carried on the case, and it looked more and more hopeless. The only ground of defense the prisoner had was that the murdered man had looked at him with such a fierce, murderous look that out of self-defense he had struck first. A ripple passed through the jury at this evidence.

The time came for Clay to make his defense. It was settled in the minds of spectators that the man was guilty of murder in the first degree. Clay calmly proceeded, laid all the proof before them in his masterful way. Then, just as he was about to conclude, he played his last and master card.

"Gentlemen of the jury," he said, assuming the fiercest, blackest look and carrying the most undying hatred in it that was ever seen,

natural in order to prevent them from being ludicrous. Some advocates twist their faces into so painful a grimace when they address a jury that one would think the weight of their task caused them physical torture. Others attempt to screw their features into looks of supreme contempt, anger or scorn. It is not every one who can convey his sentiments by a *look*. The face takes its expression from the feelings; and an advocate can no more give it a natural look which does not spring from that natural source than he could make the face of an India-rubber doll beam with pleasure. It is only by thoughtful labor and study that the sculptor can obtain an expression upon the marble which faintly represents the emotions. It is quite clear every one is not artist enough to put the right muscles in motion to produce a corresponding effect upon his own features whenever he desires it. Attempts of this kind, therefore, are not only ludicrous but foolish. The most certain method of insuring this necessary naturalness in expression is for the speaker to work himself up to a high pitch of feeling and then give way to every impulse that naturally suggests itself as a proper outlet of the pent-up fires of feeling that have been kindled within the breast. But it must be remembered that without these kindled

"gentlemen, if a man should look at you like this what would you do?"

That was all he said, but that was enough. The jury was startled and some even quailed on their seats. The judge moved uneasily on his bench. After fifteen minutes the jury filed slowly back with a "Not guilty, your honor." The victory was complete.

When Clay was congratulated on his easy victory, he said: "It was not so easy as you think. I spent days and days in my room before the mirror practicing that look. It took more real hard work to give that look than to investigate the most obtuse case."

fires of feeling there can be no natural facial expression—indeed, there can be no true eloquence.

Appropriate gestures are a very strong second to appropriate facial expressions. The trembling, quivering frame, the heavy stamping of the feet, the graceful, undulating movements of the body, the direct pointing of the finger, the spectacular flourish of the arms, the haughty twist of the head, these and many other graceful and forceful movements of the body and its appendages can be made very effective not only in lending emphasis to the arguments advanced but also to assist wonderfully in making clear to the hearer the exact meaning of the language with which the speaker has clothed his thoughts. Of course, naturalness is as necessary here as in the making of proper facial expressions although its absence is not so dangerous. Practice, in debating societies or elsewhere, will here, as in every other desired achievement in life, make perfect.

CHAPTER XV.

LEGAL ETHICS.

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197. The Advocate's Relation to His Profession—Attitude Towards Opposing Counsel.

§ 179. **General Code of Ethics.**—The term "ethics" is derived from the Greek word "*ethos,*" signifying "custom or usage." Ethics, therefore, as a science,

is in its generic sense a study of the origin and authority of the customs and usages of the people of any particular locality in matters of private duty and obligation. Of course, in a metaphysical and abstract sense, the word has come to have a more extended meaning as denoting the study of the action of the mind in determining what is wrong and what is right in accordance with certain standards set up and established by the collective or individual conscience. Nevertheless, for our purpose the original signification must be kept constantly in mind. Indeed, in the study of any phase of the general subject of ethics, this conception should be given more or less prominence.[1] All systems or "schools" of ethics trace the origin of the principles of conduct which they advocate to certain customs or usages of the people, except, of course, such systems as are founded upon reasoning purely metaphysical, in which case the individual sets up his own standard or "moral touchstone," artificial or otherwise, by which he determines the right or wrong of any particular action. When not artificial in its origin this "moral touchstone" of the individual is termed "conscience," The "collective conscience," therefore, of a community is the origin of the particular moral customs, usages or moral standards of that community, and establishes the code of ethics or rules of conduct for that community. It may be called "public opinion;" but whatever called, it is the one great

[1] "When man reaches the stage of philosophical questioning, and communes with himself concerning morals as of other things in general, he comes to the task with morality ready-made and in full operation. His real object is not to find speculative principles and deduce morality from them as if morality had to be invented for the first time, but to assign principles on which he may account for the morality already familiar to him." Pollock's Essays, 293.

source of all practical systems of ethics, etiquette and good manners. Therefore we have different standards of morality in different communities, the variation in which is largely due to the past history, education and environment of the people composing that community.

§ 180. **Code of Legal Ethics.**—For the same reason that different communities may have different standards of morality in general, so, also, different castes, guilds, crafts, or professions, may, because of their peculiar lines of work and the inter-relation and association of their members, require additional standards to determine the propriety and morality of actions and transactions peculiar to such castes, guilds, crafts or professions.[1] The profession of the law is no exception to this rule. The code of legal ethics is that system of rules which by mutual consent is observed by members of the legal profession as the standard by which to determine the propriety of their conduct and relationship toward their clients, the courts and other members of the profession. Of course, such a system of ethics does not supplant the general code observed by the community as a whole. It only adds to these standards of morality, observed by the general public, additional rules of conduct applicable to the profession of law and its peculiar relationship and duties.

On August 27th, 1908, in the city of Seattle, the

[1] "A craft, or profession, from its experience and observation, establishes certain canons of ethical import and makes rules for the guidance and government of its members. The rules may be express or implied, and it is immaterial whether they be written or unwritten. It is sufficient that they have received a general assent by substantial observance only. They then become binding on all of the members, and derelictions therefrom constitute breaches of the ethical code." Warvelle's Essays on Legal Ethics, p. 19.

American Bar Association adopted a written code which it entitled, Canons of Professional Ethics, and which was drawn up after thorough and careful consideration by a committee of the most prominent lawyers of the country under the able direction of Hon. St. George Tucker, of Virginia.

This code sprang at once into immediate popularity throughout the profession and quickly supplanted all local written and unwritten codes. All local bar associations adjusted themselves to the new code and courts and legislatures made it a part of the course of study of every applicant for a license to practice law.

This written code, while it is but declaratory of the unwritten rules of conduct which the best lawyers have held inviolate for centuries, has the advantage of speaking clearly and with authority. And since it restricts the older and more successful practitioner in many of its prohibitions as severely as it does the younger lawyer, it has obtained the latter's generous and enthusiastic support where formerly it had only his grudging compliance.

The Canons of Professional Ethics are set out in full in the appendix and fully indexed. Reference should be frequently made to these rules to test one's professional conduct which cannot profitably depart too far from an observance of the spirit of their provisions.

§ 181. **Inviolability of the Code of Ethics.**—No caste, guild, craft or profession is possessed of a code of ethics which is more jealously guarded than that of the profession of law.[1] And this is not without rea-

[1] "Legal ethics may be distinguished from the general subject in that, while a violation of the moral code, as established by the conventions of society, will usually result in nothing worse than social

son. No profession, not even that of the doctor or the preacher, are as intimate in their relationship with the people as that of the lawyer. To the doctor the patient discovers his physical ailments and symptoms, to the preacher the communicant broaches as a general rule only those things that commend him in the eye of heaven, or those sins of his own for which he is in great fear of eternal punishment, but to his lawyer he unburdens his whole life, his business secrets and difficulties, his family relationships and quarrels and the skeletons in his closet. To him he often commits the duty of saving his life, of protecting his good name, of safe-guarding his property, or regaining for him his liberty. Under such solemn and sacred responsibilities, the profession feels that it owes to the people who thus extend to its members such unparalleled confidence the duty of maintaining the honor and integrity of that profession on a moral plane higher than that of the merchant, the trader or the mechanic. And having the power to maintain its high professional standards by a show of authority possessed or enjoyed by no other profession, a lawyer takes his professional life in his hand when he violates any of these unwritten rules of conduct sustained by the overwhelming sentiment of the profession and strictly and summarily enforced by the courts. The young lawyer, fresh from the victories of the class-room may be inclined sometimes to become restless under the limitations imposed upon him by the code of ethics

ostracism, a disregard of the ethics of the bar may result in professional death. In society men are kept within bounds by no stronger a force than public opinion, but in the legal profession a summary jurisdiction is lodged in the courts to discipline offenders against good morals and good conscience." Warvelle's Essays in Legal Ethics, p. 20.

and to regard them as an imposition. It is only when it is explained to him that his profession is not an independent one, that its members are mere officers of the court and not only derive all their authority from the court but are subject to all reasonable orders and regulations imposed upon them by the courts and, through the courts, by the profession itself, that he recognizes not only the unreasonableness of his objections but their futility as well. Another deterring influence to one inclined to be recalcitrant, and one not to be lightly estimated, is that of the respect and goodwill of other members of the profession. The public very wisely rates a lawyer by what his professional brethren think of him, and an advocate who, by his un professional tactics and conduct, assiduously invites and cultivates the enmity of the members of his own bar, will very quickly hit the bottom, and stay there among the "snitches" and vagabonds of the profession until he comes to himself, and by circumspecting his conduct and courting the confidence and respect of other lawyers, he finally wins the place to which his ability entitles him.[1]

§ 182. **To What Extent Professional Conduct is Affected by the Code.**—It of course goes without saying that a lawyer should be a gentleman and a good citizen, but for violations of the general rules of etiquette

[1] "The bar has a rigid form of etiquette with respect to many transactions. A violation of this form is attended only by a loss of professional standing. At first blush this punishment does not seem very severe, and, because its effect is not always immediately apparent, many men are induced to persist in practices that contravene accepted standards. But, in the end, there is scarcely any form of punishment that can compare with it." Warvelle's Essays in Legal Ethics, p. 49.

or even for violations of the criminal code, unless the provision of the code is but a declaration of the rule of legal ethics, the lawyer is not responsible or answerable in his professional capacity. The lawyer's responsibility for professional misconduct extends only to those relationships into which he enters by virtue of his office, but as these relationships are so extensive in their various ramifications, it is difficult to put a definite limit on the applicability of the code of ethics to a lawyer's conduct and actions. These relationships may be grouped under four heads—(1) the advocate's relation to the state; (2) the advocate's relation to his client; (3) the advocate's relation to the court; (4) the advocate's relation to his profession. The statutes in most states provide that a license to practice law authorizes the advocate "to appear in all the courts within the state and there to practice as an attorney and counselor at law, *according to the laws and customs thereof,* for and during his good behavior in said practice."[1] By the term "laws and customs" of practice is meant the principles of the code of ethics as well as the rules of court provided for the purpose of regulating the local practice of the law.

While as a general rule the private life and character of the advocate are not called in question by the court on ethical grounds, at least as to particular acts of misconduct, still where an advocate, by repeated and deliberate wrongdoing in his private life and transactions, gains a reputation so damaging as to injure him in his standing before the community as a man of good moral character, the court, at the instance of the profession or some proper authority, may dis-

[1] Rev. Stat. Mo., 1899, Sec. 4918.

cipline the offender or cut him off entirely from the ranks of the profession.[1]

§ 183. **Methods of Enforcing the Code—By Court Proceedings.**—The courts enforce the principles of professional ethics by summary proceedings. This jurisdiction of the court seems to be derived from the general supervisory and disciplinary power which a court exercises over its own officers. The advocate being nothing more than an officer of the court—a part of the judicial machinery—is under the immediate control of the court; as much so as any other part of the judicial machinery.

The first and most important method of enforcing the code of ethics is that of disbarment, a proceeding that absolutely extinguishes the professional life of the advocate. This is the most severe and effective of all proceedings for enforcing the provisions of the code and is administered only in cases of flagrant disregard of professional ethics or high moral duty.[2]

1 "It is an essential condition to admission to practice that the applicant shall be a man of good moral character. The primary object of this is to maintain a high standard of moral excellence in the profession and conserve the ancient dignity of the bar. This being true, it necessarily follows that this essential character should be maintained after admission, and when the conduct of the licentiate clearly shows, either that the court was deceived at the time of his admission, or that there has been a moral degeneracy since that time, a proper case for discipline may be presented." Warvelle's Essays in Legal Ethics, p. 47.

2 "It is laid down in all the books in which the subject is treated that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts, and, in gross cases of misconduct, to strike their names from the roll. If regularly convicted of a felony, an attorney will be struck off the roll as of course, whatever the felony may be, be-

Another proceeding is that of suspension. This is but a species of the first proceeding; indeed, suspension is disbarment for a definite period of time. It is a remedy which is administered in cases which would hardly justify a decree of disbarment.

A third proceeding is that of the imposition of a fine. This is a very effective remedy because of the fact that the court will often compel the guilty party to work out his fine. Another method of discipline is that by way of *reprimand,* which is one very frequently administered.

It must be borne in mind that this power to discipline advocates is administered not for the sake of punishing the offender—(the criminal courts will do that)—nor merely to assert the dignity of the court—

cause he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken. He will also be struck off the roll for gross malpractice or dishonesty in his profession." Bradley, J., in *Ex parte* Wall, 107 U. S. 265, 273.

In Archbold's Practice, editions by Chitty, p. 148, it is said: "The court will, in general interfere in this summary way to strike an attorney off the roll, or otherwise punish him, for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in or intrusted with it in consequence of that character."

And it is laid down by Tidd that "where an attorney has been fraudulently admitted, or, after admission, had been convicted of felony, or other offense which renders him unfit to be continued an attorney, or has knowingly suffered his name to be made use of by an unqualified person, or acted as agent for such person, or has signed a fictitious name to a demurrer, or otherwise grossly misbehaved himself, the court will order him to be struck off the roll." 1 Tidd's Practice, 89.

The above quotations evidence the indefinite application of the code of ethics. For a review of the authorities we refer the reader to the celebrated case of *Ex parte* Wall, *supra.*

(that is a matter that comes under the subject of contempts), but to assert the dignity of the profession and vindicate the authority of he ethical code.

§ 184. **Methods of Enforcing the Code—By Professional "Courts of Honor."**—For lack of a shorter and more suggestive term I have grouped under the term, "Courts of Honor," all those committees by whatever names they may be called, created by several local bar association, to construe the code and answer questions with relation to its violation in specific cases. The most notable of these committees is the Committee on Professional Ethics of the New York County Bar Association. This committee has at regular intervals passed on hundreds of questions submitted to them for their opinions. These opinions are published and constitute a valuable commentary on the Code of Ethics. The questions are submitted by lawyers of every station of professional attainment and cover every phase of ethical delinquency.[1]

In Chicago the Executive Committee of the local bar association have also for some time been handing down opinions on questions submitted by members of the association.

It will be interesting to watch the development of this new method of enforcing the Code of Ethics and it is not unlikely that the coming generations of the bar will be compelled to find room on their shelves for sets of reports setting forth the opinions of these newly-constituted professional courts of honor.

§ 185. **The Advocate's Relation to the State—General Considerations.**—To the state the lawyer sustains

[1] See appendix for report of decisions of the New York Committee on questions of legal ethics.

a most intimate and important relation. To him is intrusted the enforcement of its laws, and hardly anything could be conceived more detrimental to a state than a corrupt and antagonistic bar. Most states, therefore, require that one applying for a license to practice law shall make an oath to support the constitution and laws of the state and of the United States.

So also when this peculiar relation of the advocate to the state is taken into consideration, it would seem incongruous that one convicted of a violation of the laws of a state should be permitted to remain as an officer to assist in the enforcement of the laws he has trampled under foot. It is therefore provided in many states that a lawyer convicted of a felony or an infamous crime shall be disbarred from his right to practice law. This is also the rule at common law.[1]

Another important consideration for the advocate to remember is that not only must he himself not violate the constitution or laws of the land, but he must not assist or encourage others to do so. If he do, he commits a most serious breach of professional ethics, and in severe cases may be suspended or removed from practice. Thus it has been held that where an attorney exhorted a mob of citizens to take the law in

[1] The fact that the crime has been condoned does not affect the case. Thus, in a case before Lord Mansfield, an attorney was convicted of theft, and the crime was condoned by burning in the hand. The court nevertheless ordered his name struck from the roll. "The question is," said Lord Mansfield, "whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. * * * It is not by way of punishment; but the courts in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not."

their own hand and urged them to enter a jail and take therefrom a prisoner, against whom the popular mind had been inflamed, and lynch him, such attorney was liable to summary disbarment without trial, without petition and on the court's own motion.[2]

§ 186. **The Advocate's Relation to the Court—General Considerations.**—It has already been intimated that the work of the advocate is not entirely an independent calling. The advocate is, in truth, merely an officer of the court. In ancient times the first licensed practitioners were called *Servientes Domini Regis ad legum*—"Servants at law of our Lord, the

[2] *Ex parte* Wall, 107 U. S. 265. In this case it appeared that on a certain day an attorney took part in a riotous and tumultuous mob who were seeking the life of a certain person charged with a very foul crime. The attorney addressed the mob in excited tones and advised and urged them to enter the jail and lynch the prisoner. The mob followed his advice and his leadership and hung the prisoner. The court, of its own motion, cited the attorney thus implicated in this terrible crime to appear at a certain time and show cause why his name should not be stricken from the roll. After the hearing the court entered judgment striking the name of the delinquent attorney from the roll. In affirming the decision of the lower court, the United States Supreme Court, speaking through Mr. Justice Bradley, said:

"Now, what is the offense with which the petitioner stands charged? It is not a mere crime against the law; it is much more than that. It is the prostration of all law and government; a defiance of the laws; a resort to the methods of vengeance of those who recognize no law, no society, no government. Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bonds of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve."

King.'"[1] The idea contained in this distinguished appellation has never been departed from. The American lawyer owes *his* allegiance to his state and especially to the state's judicial representative—the court, whose officer he is. This peculiar relation is found in no other profession; the physician, indeed, is not subject to any tribunal empowered to interfere with and regulate his practice by arbitrary rules; and even the preacher, if he feels the restraint of his synod or general conference to be too exacting, may go out as a free lance and by an extravagant and abusive style of preaching, which would not be tolerated for one moment in a court of law, attract to himself a large following and incidentally a large income. But a lawyer's existence depends on his agreeable relations with the court. If he is *persona non grata* with that tribunal, his business as an advocate is gone. If, therefore, an advocate should impugn the integrity of the court or bring its judgments into disrepute he may be severely reprimanded and punished by the court he has abused, and in severe cases he may be disbarred from practice. Some attorneys fail to appreciate this fact, with disastrous results to themselves. They

[1] "The first persons regularly licensed to appear as advocates in the king's courts were called 'sergeants,' although their full official title seems to have been *Servientes Domini Regis ad legum.* That is, 'Servants at law of our Lord, the King.' Unlike all prior advocates, they were a part of the court itself; were regularly appointed by royal patent; were admitted only upon taking an oath; had a monopoly of all practice, and were directly amenable to the king as parts of his judicial system. The fundamental ideas involved in the creation of this class has never been abandoned, and, notwithstanding that the class itself by the name 'sergeants' has ceased to exist, they are still the distinguishing characteristics of the bar in all countries where the common law prevails." Warvelle's Essays in Legal Ethics, p. 29.

seem to think that they must be guilty of some crime or gross unfairness or fraud against their client in order to justify their disbarment from practice. Undoubtedly the majority of cases arise under such circumstances, but the courts frown equally as sternly upon actions of an attorney that bring the court or its officers into disrepute.[1] The advocate, therefore, should make it his chief concern to uphold the integrity and dignity of the court before his client and before the public.

In this connection it might not be improper to mention, what would seem only too evident but for its not infrequent occurrence—that to tamper with the records of the court clandestinely for the advocate's own advantage, or for any other purpose, is not only strictly unprofessional, but will render the advocate liable to be summarily dismissed from the profession.[2]

[1] People v. Goodrich, 79 Ill. 148; People v. McCabe, 18 Colo. 186, 32 Pac. Rep. 28, 36 Am. St. Rep. 270.

[2] People v. Murray, 166 Ill. 630. In this case it was held that where an attorney falsified a bill of exceptions after the judge had signed it, and procured the clerk to certify a transcript of the record containing the false matters, he was guilty of such misconduct as would empower the supreme court, in the exercise of its discretion, to summarily strike the name of such an attorney from the roll. In this case the lawyer was a young man just admitted to the bar. He pleaded ignorance, but the court refused to listen to the plea. The court said: "He was twenty-seven years old, has had charges of two or three cases in the appellate court, and made abstracts in them, had studied law sufficiently to be admitted to the bar, and must have known the uses and objects of testimony. * * * But if his testimony is true, it evidences a want of moral sense which would render him incapable of appreciating and discharging the duties and obligations of a lawyer toward the courts. If, at his age, and with his experience, he cannot discern the necessity and propriety of observing the truth and not imposing upon the courts by falsehood, it is plainly our duty to protect litigants against such practices as he indulges in, although he may not think them improper. A

§ 187. **The Advocate's Relation to the Court—Attitude Towards the Judge.**—When the barrister enters the court room he is morally bound to act fairly toward the court, deceiving it neither upon the law nor the facts, quoting authorities truthfully and offering no garbled extracts nor cases known by him to be overruled. He will accord to the magistrate that deference which the office demands, irrespective of the man who fills it; a degree of courtesy not easily attainable, since a large part of a judge's duty is said to be rendering it disagreeable for counsel to talk nonsense. He must deal openly, not attempting in private interviews and casual encounters to prejudice the mind of the judge by *ex parte* statements, or to insinuate arguments against the adversary which the latter is not present to answer. Toward the judge he must conduct himself with the utmost deference, yet with firmness and a due regard for his client's rights, being neither overawed by the judge's greatness nor filled with unconcealed contempt at his ignorance. If an advocate is called to face some Jeffries on the bench, who seeks to override law and lawyers, he should remember his personal dignity that he is as much an officer of the court as is the judge; his interest in the case and his client's welfare; and thus emboldened, stand firm with the respectful resolution of Erskine when he braved Lord Mansfield and pronounced his famous arraignment of the Earl of Sandwich, which won him his cause and his fame, and who afterwards said that he dared speak as he did because he felt his little children plucking him by his robe and saying: "Now,

person with such ideas should not be numbered among the members of the profession whose duty it is to aid in the establishing of truth and the administration of justice."

father, now is the time to get us bread!" The advocate should remember that the judge is unfamiliar with the case, and with much of the law pertaining to it; that his special preparation renders him far better acquainted with both the law and the facts than is the judge; that his duty is to assist the latter, and to that end to take nothing for granted; he is to watch for signs of especial interest on the judge's part, and welcome interruptions which show at what points he is experiencing difficulty.

§ 188. **The Advocate's Relation to the Court—Attitude Towards the Jury.**—Toward the jury the advocate's demeanor should be manly and winning. They must be treated with deference and no slight is to be cast upon any class of men to which they may belong. They will not resent the utmost simplicity of statement, or the homeliest explanation of the law and the evidence, but if they conceive the advocate is not in earnest or is misleading them, they will do the most embarrassing thing they can think of—take out their watches and yawn while he speaks. The advocate should look at them as individual men, not as "a jury." He should know something of their separate histories if he can, and make them his confidential friends as he stands before them in argument. Look them straight in the face with an earnest "significant look."

Policy, if no higher incentive, directs the lawyer to preserve a strict integrity toward the jury, neither misleading them by falsely colored statements of the evidence nor by loose, ill-considered propositions of law. Nor will he testify before them while purporting to advance his arguments. He will recall his oath enjoining upon him respect for the court, and he will never, save in extreme and exceptional instances,

strive to set against each other the judge, who declares the law, and the jury, who must apply it. In all things he will remember the admonition offered four centuries ago to his younger brethren by one learned in the law: "I counsel thee that thou do nothing against truth; if thou do thus, I trust the lantern, which is thy conscience, shall never be extincted."

§ 189. **The Advocate's Relation to the Court—Attitude Towards His Own and Opposing Witnesses.**—In his dealings with a witness upon the stand, he is under no obligation to examine him upon all phases of the controversy. He may properly assume the adversary will develop those points which are damaging to the opposite party. Nor is he compelled to enter upon subjects which the witness is privileged, by the law, to conceal. He will never indulge in bravado and insult toward those testifying with evident fairness, nor will he be brutal in investigating the private life of an ingenuous witness, solely for the purpose of degrading him in the eyes of the jury. The true barrister will also scorn the practice of distorting the language of the testimony by his argument, or putting into the mouth of another words and sentiments he did not utter.[1]

[1] "An advocate should not descend to the insidious art of inducing a witness to answer with one meaning and assume his reply to bear another, and thus lead him to give evidence which, intended to be true, shall have the effect of falsehood. Such conduct is a species of criminal trickery so nearly allied to subornation of perjury that it is difficult, from a moral point of view, to distinguish between them. * * * No lawyer can long continue in the practice of confusing the honest, browbeating the timid, falsely construing the words of a witness, or placing in his mouth words that were never uttered, without acquiring the character of a trickster." Warvelle's Essays in Legal Ethics, p. 109.

No less reprehensible is it to approach the witnesses of the adversary, or the adversary himself, under the guise of friendly interest and thereby secure facts in the case which would not have been divulged had the real character of the interlocutor been known. On the other hand, if the opposing party at any stage of the proceedings seek advice from his antagonist's attorney, professional ethics require an outspoken refusal to act for both sides of the controversy. Should it happen that the attorney who is thus approached sees it is advantageous for each party that a given course be pursued, he may honestly comply with his opponent's request, but never if the interests of the litigants are irreconciliable; for either he will betray his employer or practice a deception upon one who consults him as a confidant, and discovers, too late, that the kisses of an enemy are deceitful.

In regard to improper methods of procuring witnesses to testify, it goes without saying that the bribery of opposing witnesses is not only in violation of the code of ethics, but subjects the offender to the penalties of the criminal code as well. Whether, however, an advocate, in order to persuade a witness favorable to his side of the controversy to be in attendance at the trial, may contract to pay such witness a certain sum of money, does not, to our mind, admit of any doubt. We can conceive of no reasonable objection to such conduct. It does not corrupt the witness, but merely secures to him a reasonable compensation for his trouble in place of the meager pittance allowed by law. Whether a witness may be offered a fee for his testimony, in addition to his compensation for loss of time, does not seem, at the present time, to admit of much doubt. The public as well as the profession have

not shown any spirit to condemn the practice, at least so far as expert witnesses are concerned.

§ 190. **The Advocate's Relation to the Court—Should an Advocate Practice in a Court in Which the Judge Is His Near Kinsman.**—There is nothing in law to prevent an advocate from practicing in a court over which his father presides. Nor can such practice be construed strictly unethical, although rules of legal etiquette would seem to interpose an objection. The reason that neither law nor ethics make any protest to a situation of this kind is because an attorney or counsel in a suit is, in theory, presumed to have no personal interest in the event of that suit, and that his fee is not contingent upon the result; that he is regarded as disinterested and unchallengeable, though he may be of near kin to the judge presiding at the trial. And thus there is no recognized positive law which is held to exclude an attorney or counsel from appearing on the trial of a cause in his father's court. The objection to his appearing in such relation, if any, can only rest upon that natural bias of feeling and sympathy which a judge is supposed to entertain towards his own son or brother, or other near kinsman, who may have charge of a cause in his court—an interest which he is not supposed to have toward the opposite counsel who is not so related to him.[1]

[1] "To illustrate this principle," says John F. Hageman in 14 Cent. L. J. 268, "take the case of a young, struggling lawyer who is retained in a suit involving, if he succeeds, a million of dollars to his client, and to himself an enormous fee, besides a reputation which is equivalent to a fortune. Brilliant success in a celebrated case has often lifted a lawyer from obscurity to eminence in his profession. Now place this young man with such a suit in a court in which his near kinsman—his father, for example, is the judge, and assume such judge to be a man of rare purity and honor in life—a

A judge placed in such circumstances may be strong enough to disobey the feelings and affections of his nature, and may conduct the trial of the cause with absolute blindness to the parties and their counsel, and with indifference as to the result of the case, but if the efforts of his kinsman in court should be successful, there would naturally be clamor and scandal raised by the losing party and his sympathizers against the integrity and impartiality of the court, which would affect public opinion and impair public confidence in the judiciary.[2]

model man. Yet he is not a model man if he is destitute of natural affection, or sympathy stronger than a mere bias for the success and upbuilding of the reputation and fortune of his own son. Is it not easy to see that in the trial of the cause, and in the charge to the jury, especially in arraying and commenting upon the testimony, the judge would likely be warped, quite unconsciously, and, it may be, with great subtlety, giving his official influence to secure a verdict favorable to the side which his son had espoused? In questions of pure law there is not so much danger from the partiality of the judge because his rulings can be reviewed before a higher tribunal when his reputation will be involved. But in questions of fact at *nisi prius*, there is scope for a strong partiality without any corrective influence."

[2] John F. Hageman in the article from which we have quoted in the former note, gives some prominent illustrations of the recognition of this rule. He says: "It is to avoid even a suspicion of partiality that some judges of great delicacy of honor have been unwilling that their sons, or other near kinsmen, should practice in their courts. Judge Roosevelt, of New York, twenty-five years ago, was an example in point, and no member of the New York bar or bench was more respected for his fine sense of professional honor than he. Another illustrious example among the members of the New York bar was found in James T. Brady, who was recognized as the soul of honor. When his brother, John R. Brady, became judge of the Common Pleas in the City of New York, James, solely because of his relationship to the judge abstained from that time from all practice in his brother's court, though he was offered large fees to make motions in that court.

At the Philadelphia bar we had an illustrious example in the

It may be urged that judges are, and should be, above the suspicion of partiality or bias under all circumstances, without regard to personal friendship or natural affection so far as the members of the bar are concerned. Whether this is so or not, the lawyers do not assume it to be so, even in cases where the judge is of the most exalted character for honor and integrity. And if it were known how severely the practice is condemned by the bar and the public, and what scandal attaches to it in many cases, no judge who respects his office and his honor would subject them to such aspersions.

§ 191. **The Advocate's Relation to the Court—The Impersonality of the Advocate.**—One of the commonest faults of the young and inexperienced lawyer is to thrust *himself* too prominently into his case, making his own honor and veracity an issue to the total exclu-

United States District Court, over which Judge Cadwallader presided for many years. His son, John Cadwallader, was an honorable member of that bar, but he never practiced in his father's court, although his business there would have been very remunerative on account of bankruptcy proceedings therein. The judge suggested to his son the propriety of his confining his practice to other courts; and during the entire judicial life of the judge, both he and his son adhered with scrupulous fidelity to this principle of professional delicacy and judicial ethics. And their conduct in this respect elicited the warmest commendation of the bar.

There are doubtless many other similar instances in the various states, which are not very generally known. And there are also, perhaps, many more cases of the other class, in which no regard is paid to the relationship of the attorney to the judge; or rather, such relationship is often the ground on which multiplied retainers are given to an attorney in the court of his father or near kinsman. These retainers are generally understood to be given, not because of his ability or experience, but simply because of his kindred relation to the court. His business increases; his briefs multiply; large corporations select him for counsel, though they already have older and superior men retained and depended upon."

sion and obscurity of his client. This is not only unwise, but highly unprofessional. A lawyer is an advocate—one who speaks for another. He is not to protrude his own personality; and to the extent he does so, he either cheats his client or unfairly influences the court or jury in his favor, depending upon the fact whether he is a man of little or great influence. In either case he acts unprofessionally. Many a lawyer has proceeded to the trial of a cause on the assumption that he was identified with the merits of the cause of his client. This, we scarcely need point out, is an entirely erroneous view of the functions of the advocate. He is the representative of the interests of his client, and not the guarantor of the righteousness of his cause; it is his duty to argue, and not to judge. He has no more right to say that his client is not guilty than to say he is guilty. A counsel in a criminal trial who expressed his personal belief in the innocence of the prisoner would be guilty of a rare departure from one of the best recognized traditions of the bar. Very seldom has this elementary rule of advocacy been broken without an emphatic protest being made. When, for instance, in the celebrated *Palmer Case,* in England, Sergeant Shee asserted his personal belief in the prisoner's innocence, Sir Alexander Cockburn rebuked him by saying that he "had better have abstained from making any observations which involved the assurance of his own conviction," and condemned the expression of his individual opinion as "strange and unprecedented." The impersonality of counsel is the fundamental principle of advocacy.[1]

[1] The practical effect of a disregard of this rule of ethics was brought out conspicuously in a criminal trial before Mr. Justice

Whether an advocate should permit himself to be a witness in his own case might be a question of some

Herrick, of the Supreme Court of New York, in which the learned justice in his charge to the jury severely arraigned both the counsel for the state and for the defendant for expressing to the jury their "personal belief" as to the guilt and innocence, respectively, of the accused. Justice Herrick said: "Perhaps it is well, gentlemen, before we come to consider this case, to brush away some of the things that have no business in it. Each counsel that you have observed here has proclaimed his belief; the one that of the innocence of his client, and the other the guilt of the man he is prosecuting. You will not take that into consideration for a moment. It is a grossly unprofessional thing for a lawyer to state to a jury what his belief is. Counsel of experience, reputable counsel, never indulge in it. These gentlemen, when they get older and have more experience and have paid more attention to the ethics of the profession, I think, will not indulge in that sort of thing. They carry no weight; it is the unsupported statement of men. They are placing themselves for credit and standing in the community before you without the sanction of an oath that any witness presents in a case. You have no right to consider it for a moment, excepting as an indication that the counsel have not risen to the best standing of their profession." To many this public denunciation of the methods of counsel in this case will be considered too severe, and so it may be. And yet it cannot be doubted that it will be a wholesome lesson to the attorneys themselves as well as to others who might in the future fall into this same error.

The sentiments expressed by Hon. George F. Hoar in a recent article in referring to this practice are very pertinent. He says: "It is not the duty of an advocate nor his right to express or convey his individual opinion. On him the responsibility of the decision does not rest. He not only has no right to accompany the statement of his argument with any assertion as to his individual belief, but I think the most experienced observers will agree that such expressions, if habitual, tend to diminish and not to increase the just influence of the lawyer. There never was a weightier advocate before New England juries than Daniel Webster. Yet it is on record that he always carefully abstained from any positiveness of assertion. He introduced his weightiest argument with such phrases as 'It will be for the jury to consider.' 'The court will judge.' "It may, perhap, be worth thinking of, gentlemen,' or some equivalent phrase by which he kept scrupulously off the ground which belonged to the tribunal he was addressing."

doubt under rare circumstances. So far as the law is concerned there seems to be no objection to it.[1] However, from the standpoint of professional etiquette, the practice is to be sternly discountenanced. If it be necessary for an attorney to appear in a case as a witness he should observe the proprieties of the situation and withdraw as an advocate unless his testimony is intended to prove a mere formality.

§ 192. **The Advocate's Relation to His Client—The Supremacy of the Client's Interests.**—The association of lawyer and client is as confidential as that between clergyman and penitent, more intimate than that existing between doctor and patient. It requires of the attorney not a surmise concerning the rights of one soliciting his advice, but an honest, intelligent, unprejudiced opinion, the result of painstaking examination into the facts and the law applicable to the particular case, even though the lawyer realizes he is counseling against his own pecuniary interest. He will resolutely abstain from hurrying the client into doubtful or hopeless litigation, but will sink beneath his consideration, himself, his ambition for fame, his love of wealth, his eagerness for conflict, and hold tenaciously before him only his client's welfare.[2] When once he has undertaken the battle for another,

[1] Morgan v. Roberts, 38 Ill. 65; Frear v. Drinker, 8 Pa. St. 521.

[2] "An attorney at law ought not to accept a retainer in a case when he believes that the law is against his client. It is not his duty, in order to subserve the interest of his client, to misstate the law and the facts, and if he is satisfied that the client cannot recover, except by perversion of the law and the facts, the attorney ought not to take the case." Per Beck, J., in Smith v. Railroad (Iowa), 15 N. W. Rep. 291.

his moral duty commands that he bring into play every resource of mind and heart, leaving no legitimate argument untouched, no investigation untried and that he make himself master of the situation.

§ 193. **The Advocate's Relation to His Client—Is Truth a Higher Obligation?**—The devotion to a client's interests never obscures the advocate's recognition of a higher obligation to the cause of truth. If he be employed by one who, with a perverted sense of right, asks his attorney to stoop as low as the client himself would descend, two alternatives are open to the lawyer of integrity; either to require honesty from his employer or to withdraw from the case. Lord Brougham maintained that an advocate should consider no one except his client, for whom he must be reckless of consequences, resorting to all means and expedients, disregarding the alarms, the torments, the destruction of others, and even bringing confusion upon his country if this were essential to success;[1] but a far higher

[1] The extraordinary language used by Lord Brougham in a very celebrated case, which has misled many an inexperienced advocate, and is calculated to mislead a great many more, to the danger of their unfortunate clients as well as the peril of their own prospects, is as follows:

"There are many whom it may be needful to remind that an advocate—by the sacred duty of his connection with his client—knows, in the discharge of that office, but one person in the world—that client and none other. To serve that client by all expedient means, to protect that client at all hazards and costs to all others (even the party already injured), and, amongst others, to himself, is the highest and most unquestioned of his duties. And he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any others. Nay, separating even the duties of a patriot from those of an advocate, he must go on, reckless of the consequences, if his fate should unhappily be to involve his country in confusion for his client."

Although some of the terms of this sweeping proposition might be

plane of professional conduct was reached by the late Charles T. Russell, of Massachusetts, of whom it was said that, when retained by a client who had no conscience, Russell gave him one. Thus will it be with every barrister who, in assuming the responsibilities of his calling, remembers his duty as a man.

So, also, is truth not only a higher obligation but a more profitable course as well in answering the arguments or evidence of one's opponent. What is the use of an advocate endeavoring to prejudice the cause of his opponent by saying, "Gentlemen, I don't say

assented to, and especially in the circumstances which gave them utterance, there is surely much that an honorable man would shrink from, even though he gave full scope to the meaning of the word "expedient." In the impetuosity of advocacy such as Brougham was stirred up by the occasion to employ, it might have been excusable to use such language; but if it be examined its propositions can scarcely be assented to.

An advocate can hardly claim a higher privilege than his client could claim for himself were he defending his own cause. Would he be permitted to disregard the suffering, the torment, the destruction which he might bring upon others? And under what circumstances could the expediency of bringing down such overwhelming calamities arise? If it could never be expedient, all the rest of the sentence, with its catalogue of evils, might have been left out. If it could be expedient, when?

An advocate should be tender of the feelings of others, although engaged in the "sacred duty of his connection with his client;" and above all things, he ought to be the guardian, and not the destroyer, of private character; he should observe the golden rule of "doing unto others as he would be done by," nor should he lose or suspend the feelings of a Christian and a gentleman; he *should* regard "the alarm, the suffering, the torment, the destruction which he may bring upon others." "To serve his client" may be "his highest duty as an advocate," but it is yet hoped it would not cause him to forget his duties as a man, or prevent him from abandoning a cause which he can only win by dishonorable means. Besides this, an advocate who casts destruction broadcast may involve his client in the general ruin, and is sure in any event to injure him in the estimation of the jury.

that the defendant has obtained these goods by false pretenses, but I say his mode of dealing will not commend itself to your minds?" This is a trick—an impoverished one, it is true; but so would every other trick seem if we were to write it down. Look at the following: "I don't think much of such and such a transaction, or the fact that the defendant did or said so and so. I merely call your attention to it in passing." These are devices which do not approach to the pretensions of art, and are unworthy of a good speaker. They are not the truth—not the words of sincerity; and when an advocate has neither truth nor sincerity, although he may have acting, he cannot have the highest and best speaking. Truth and sincerity are among the charms and graces of eloquence, and they are the power that stirs and impresses an audience. It must not be understood that there are not two ways of presenting a sound proposition or an incontrovertible argument. Truth and sincerity themselves may, in an uncultured and inartistic speaker, be made to look absolutely offensive, and not only to look so, but to be so. Therefore it is necessary, if an advocate would impress his hearers, that art should come to the aid of reason; the same idea and the same truth may be conveyed in coarse as well as cultured language. One need not say in which it will be transmitted most effectively; but the tricks referred to are apart from both, and partake more of the style appropriate to the conjurer at a fair than to an advocate speaking at the bar. Nothing, therefore, contributes so powerfully to the success of a lawyer as a reputation for veracity and straightforwardness. Let the court and jury come to suspect that the advocate has a serious impediment in his veracity; in other words, let them

once lose confidence in him as a man, in his word and in his sincerity, and he might just as well sit upon the counsel table and fiddle for that court and jury as to talk to them. No matter how profound, no matter how sound, no matter how logical, no matter how powerful otherwise his argument may be, it will be vain; and his adversary, if he be a man in whom the court and jury have confidence, who has so deported himself in his practice that they believe him to be an honest, sincere and truthful man, has a vast—it may be an overpowering—advantage of him.

§ 194. **The Advocate's Relation to His Client—Defending One Whom the Advocate Believes to Be Guilty.**—Whether the attorney may undertake the suit of one whom he believes to be in the wrong, is a question not admitting of an unqualified answer. If he be called upon to defend a criminal who privately confesses to the commission of the offense, he may still accept the employment with a clear conscience, informing his client that he will oppose all unwarranted attacks and will see that no injustice is done the accused. Even the hunted beast has some rights in the chase, and guilty men must be convicted by the law, not in defiance of it; otherwise gross wrong is committed to attain a right result. Nor can counsel always be assured that the confessed murderer is, in fact, guilty. Mental derangement, a mistake of facts, the coercion of another, a desire to draw on himself the punishment justly due to a friend or a relative, may render the confession worthless. The counsel is not to establish himself as a court for the trial of every man's case, for the law presumes innocence and not guilt. Its indulgence to the culprit declares that

even the judge shall be his advocate, but it does not permit his advocate to be his judge.[1]

§ 195. **The Advocate's Relation to His Client—Becoming a Party to a Fraud, or Maintaining Harassing or Oppressive Litigation.**—Very different is it where the maintenance of his side of the controversy involves a reliance upon forged documents, perjured testimony, the enforcement of a fraudulent claim, the concealment of property from lawful creditors, or the

[1] Laymen not infrequently charge the lawyer very unjustly for permitting his services to be retained in defending some noted criminal toward whom the public mind is wildly inflamed and whom he may believe to be guilty. It has been a difficult task of the profession, in standing up for its privileges and duty in this regard, to convince the public that no lawyer has the right to injure his fellowman's defense by judging his case without trial. No better argument has ever been advanced than that offered by Lord Erskine in vindicating himself from the public odium which attached to him by reason of his defense of Thomas Paine. The great barrister said:

"In every place where business or pleasure collects the public together day after day, my name and character have been the topic of injurious reflection. And for what? Only for not having shrunk from the discharge of duty which no personal advantage recommended, and which a thousand difficulties repelled. * * * Little, indeed, did they know me, who thought that such calumnies would influence my conduct. *I will forever, at all hazards, assert the dignity, independence and integrity of the English bar*, without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or of the defense, he assumes the character of the judge—nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion in the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel."

collection of a debt already paid in full to his client. Here, instead of acting as a faithful keeper of his client's conscience, the advocate is expected to become a party to a positive wrong, and no professional requirement constrains him thus to compromise himself. Not squeamishly, but with rugged honesty, he must decide in every case whether the side soliciting his assistance is so palpably unjust that no reasonable man would hesitate to stigmatize it, or whether there may be a debatable question upon the merits of the cause.

Nor is an attorney under obligations to minister to the malevolence or prejudices of a client in the trial or conduct of a cause. He is therefore expected in a civil cause to decline to conduct a prosecution when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong. Nor is he to abuse the process of the court in order to compel a settlement of a demand.[1] Nor

[1] An interesting illustration of the frequent violation of this rule is given by Mr. Warvelle in his excellent work entitled "Essays in Legal Ethics," at p. 125:

"The matter under discussion finds frequent examples in connection with justice courts and other tribunals of limited jurisdiction. Thus, the law gives to justices of the peace a concurrent jurisdiction throughout the country. This fact is frequently taken advantage of by unscrupulous practitioners to harrass and annoy persons against whom they may have demands, and process is issued and made returnable at distant parts of the county and at inconvenient hours. It often happens, in such cases, if the defendant answers the summons, that the plaintiff fails to appear, and the case is dismissed, only to be commenced again in the same manner, and is so continued until finally a 'snap' judgment is entered by default. This is distinctly an abuse of process, a rank perversion of the machinery of the law, and a degradation of judicial functions, but while it violates the canons of ethics it infracts no legal rule, and the remedy, therefore, lies only in the forum of conscience."

should he take a case which presents an opportunity to take advantage of the defenseless or oppress those in financial disaster.[1]

§ 196. **The Advocate's Relation to His Client—Use of Improper Methods or Influences.**—The services which an advocate has for sale are legal, not moral nor social. It is highly unethical for an advocate to sell his political, moral or personal influence in a community and label it legal services. If he desire to sell such influences, let him leave the profession of the law and become a lobbyist, a go-between or a promoter of any and all kinds of schemes, but let him not disgrace by such methods a profession which exists only for the purpose of enforcing the law and whose only methods of offense and defense are reason and justice.

[1] "An attorney who will take advantage of a defenseless woman, say a woman in straitened circumstances, or oppress the fatherless, or 'grind the faces of the poor,' for the sake of lining his own purse, has no pretense for his practices, either in law or in equity. Such conduct is iniquitous and disreputable. The law is dishonored by such officers." W. E. Glanville, Ph. D., in 8 Green Bag, p. 209.

An incident from the life of Abraham Lincoln serves as an appropriate illustration of the rule of ethics now under consideration. A stranger called on Lincoln and desired to retain his services.

"State your case," said Mr. Lincoln. The man did. Then Lincoln said:

"I cannot serve you, for you are wrong and the other fellow right."

"That is none of your business if I hire you," retorted the stranger.

"None of my business!" exclaimed Lincoln. "My business is never to defend wrong. I never take a case that is manifestly wrong."

"Well, but you can make trouble for the other fellow," the stranger insisted.

"Yes," replied Lincoln, "I can set a whole community at loggerheads. I can make trouble for this widow and her fatherless children, and thereby get you $600 which as rightfully belongs to the woman as it does to you. But I won't do it."

Of course, an attorney may, openly and in his true character, render purely professional services before committees regarding proposed legislation, and in advocacy of claims before departments of the government, upon the same principles of ethics which justify his appearance before the courts; but it is immoral and unethical for an attorney so engaged to conceal his attorneyship, or to employ secret, personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.[1]

§ 197. **The Advocate's Relation to His Profession—General Considerations.**—Nothing should be higher in the estimation of the advocate, next after those sacred relations of home and country, than his profession. She should be to him the "fairest of ten thousand" among the institutions of the earth. He must stand for her in all places and resent any attack on her honor as he would if the same attack were to be made against his own fair name and reputation. He should enthrone her in the secret places of his heart, and to her he should offer the incense of constant devotion. For she is a jealous mistress.

That this is not mere sentiment is evidenced by the successful careers of the world's greatest lawyers,

[1] In March, 1904, the United States District Court, sitting at St. Louis, imposed the severest penalty ever imposed for an offense of this character. The convicted man was United States Senator Burton, and his offense was a violation of Sec. 1781, Rev. Stat. U. S., which provides that "every member of congress who, directly or indirectly, takes or receives any money, property, or other valuable consideration from any person for procuring, or aiding to procure, any contract * * * from the government, or any department thereof, shall be punished, etc." This statute is merely a declaration of the unwritten code of legal ethics, which the people have put into statute form for the purpose of more probable and certain punishment.

who were invariably the most enthusiastic devotees of their profession's honor and *esprit de corp.* Indeed, the advocate who starts out in his professional life as a *free lance* with the idea that he will have nothing to do with his professional brethren except as necessity or business compels him; who takes up his profession as some merchants run their business, with the idea that all his brother lawyers are his competitors, and therefore his enemies, to be underrated at every opportunity and to be antagonized at all times, is assured of an abject and dismal failure. The contempt of his own profession will drive every decent client from his office. No client desires for his advocate one whom the courts and his own profession regard disdainfully and to whom, therefore, they do not care to show any courtesies which the law does not strictly compel them to extend.

Moreover, it is to the interest of lawyers to stand together. In so many particulars are their duties and obligations reciprocal. Indeed, one advocate who has the opportunity to extend a favor to another advocate to-day may be compelled to request the other advocate to reciprocate to-morrow. Besides, nothing is so profitable and encouraging as the mutual interchange of experiences and the friendly exchange of brotherly greetings by attorneys, who may have for the moment been on opposite sides of a bitter controversy. Let the attorney, therefore, in all that he does, never forget to keep the honor of his profession unsullied, and to constantly strive to win the respect and confidence of his professional brethren.

Moreover, the Canons of Professional Ethics require the lawyer to become responsible for the non-partisanship the high intelligence and integrity of the

judiciary and to secure reforms in the law administering the course of justice in the courts and in stimulating public confidence in the judiciary. All these duties require the co-operation of all other members of the profession for their successful accomplishment. For this reason, bar associations are organized in states and local communities and it therefore clearly becomes the duty of a lawyer seeking an honorable standing in his profession, to co-operate with such associations in their many laudable professional enterprises. A lawyer, rich or poor, high or low, who deliberately withdraws himself from association with his professional brethren in his local or state bar associations can hardly square his conduct in such respect with the present requirements of the Canons of Professional Ethics.

§ 198. **The Advocate's Relation to His Profession—Attitude Towards Opposing Counsel.**—Toward opposing counsel the advocate's attitude should be courteous but unflinching, generous but not reckless in granting favors. He will avoid all personality so far as possible, never breaking into his opponent's address to the court or jury except when he is grossly misstating facts or misrepresenting him, and always dealing fairly with his opponent's arguments. He should never enter upon a trial supposing his adversary to be a fool, but rather overestimate his ability. This should serve to stimulate, not to embarrass, his faculties. Whatever may be the riot of unrest within his bosom, he must bear a front as calm and inscrutable as if the day were already his.

If our advocate is asked by his adversary, or the latter's attorney, to state what he knows of a particular transaction, what will be his evidence, who are his wit-

nesses, whether a certain document is in existence or what are its contents, or whether any of the jury are his clients, he must decline to answer at all or reply truly. The request may be unjustifiable, but this will not permit a false statement, upon which the other will probably rely. Nor will the barrister be too ready to grant every favor which his brother lawyer may suavely ask at his hands; his complaisance becomes teachery if he admits away substantial portions of his client's cause upon the assurance that the favor is merely formal. But if he promises to concede a formal point, to furnish his opponent a list of his authorities before the trial, or to agree to a continuance of the suit, he falls to the level of a common deceiver if he fails to perform his agreement to the letter.

CHAPTER XVI.

COMPENSATION AND ADVERTISING.

§199. Compensation — General Considerations.
200. Compensation —Regulating the Amount of the Fee.
201. Compensation — Contingent Fees.
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§ 199. **Compensation—General Considerations.**—Advocates just starting into practice and compelled to grasp at every straw for a livelihood, are impatient at any suggestion that there is a limitation on their right to contract for their services. This impatience disappears when he is reminded that in practice they are not irksome and serve not only to dignify the profession but to win the confidence of the people.

In the first place, as to the "honorarium." The honorarium is the name given to fees paid to advocates in the early English practice and which still obtains, in name at least, in England to-day. The honorarium is a gratuitous fee. At the very early common law when the only advocates were clericals, the service rendered by the local priest or monk was considered a pious duty on his part and was rewarded by a gift which the giver paid, not as compensation to the advocate but as an honorable thing to do on his part. This practice has continued down to the present day in England, but never obtained a foothold in this country, probably because of our practice in uniting the office of barrister and solicitor in the same individual. In this country, therefore, the profession recognizes the principle that "the laborer is worthy of his hire," and that if it is desirable to have a trained legal profession, the devotees must be compensated for the years of study and training necessary to perfect themselves for its practice.[1]

There is one exception to the modern rule that an advocate is entitled to compensation for his services, *i. e.,* when he is assigned by the court to conduct the defense of an indigent prisoner. The advocate has in such a case the right to recover neither from the prisoner, who did not contract to employ him, nor from the county, who expects him to render such services as an officer of the court in return for the privi-

[1] "The flimsy pretext of an honorarium has a nominal existence in every case, may demand and enforce such remuneration as shal compensate him for the time and labor actually expended, and in fixing the amount of such remuneration the preliminary preparation for the assumption of professional duties is a proper factor. Without this the profession of advocacy could not be maintained in this country." Warvelle's Essays in Legal Ethics, p. 75.

leges which the state gives him to practice his profession.[1]

§ 200. **Compensation—Regulating the Amount of the Fee.**—A lawyer's fee is the most uncertain thing in the world. It bears some resemblance to a woman's fickleness and, like it, has been the butt of much ridicule and sarcasm. No lawyer ever attempts to apply any hard and fast rules in such matters. It all depends, as the courts would say, on the circumstances of the particular case. It might also be said to depend on the "circumstances" of the client; whether he be in good or poor circumstances has very often considerable to do with estimating the value of the attorney's services.

The young advocate makes a serious mistake by starting out in a spirit of bravado, and charging fees which, while reasonable in an old practitioner, are ridiculous in the case of one without experience. Business is generally thrown to the young practitioner by friends, or as "feelers" by business men, or as "too insignificant" by busier lawyers, or the prospective client is very poor. In every one of these cases there is absolutely no reason or justification for a lawyer to charge what he may term "an honorable and respectable fee." Indeed, most of this business will hardly pay even a retainer, and the young lawyer will probably be asked to take it on a contingent fee. If he be wise he will encourage professional compensation on such a basis, as agreements for contingent compensation are to-day perfectly legitimate and ethical and will net him larger returns than if he exacts a certain cash retainer in advance. Clients, also, will feel

[1] Johnson v. Whiteside County, 110 Ill. 22.

more willing to engage his services on this basis, and thus he increases his business as well as his opportunities for getting before the public and for proving his ability as a trial lawyer.

The only safe and wise rule, therefore, is to begin by low fees to encourage business and gauge the charges of various clients, not on a basis of the exact time or service rendered, but in proportion to the ability of the client to pay and the benefit derived from his services. Of course, he should not cheapen his practice too much. Unless on a contingent basis, he probably should not charge less than five dollars for any legal service. This, of course, does not include fees for notarial services. If a client is stubborn, and inclined to contest and quarrel over what is really only a reasonable fee, the young lawyer will probably do well to firmly dismiss the inquirer from his presence without argument, as he will probably be an unprofitable client. Indeed, it might raise him a little in the eyes of the inquirer to say: "Oh yes, certainly, you can hire such lawyers, but I am too busy at present to take very low-priced practice." Still, with this one exception, the young lawyer must remember the proposition with which we opened this paragraph—he must be fair and tactful with his clients in the matter of compensation, never driving them away by overcharging. Later on, when his reputation is made and his ability proven, the matter of fees will trouble neither him nor his clients, as among the better class of clients there is rarely ever any argument over the amount of a fee.

Very often associations of commercial lawyers, and sometimes even local bar associations, attempt to regulate the charges for various services to be ren-

dered. An advocate who directly or indirectly agrees to such regulations is bound by them, and would very seriously offend the ethics of the profession were he to disregard such regulations.[1]

§ 201. **Compensation—Contingent Fees.**—At a time when the honor of the profession of law was more prominent than its business aspect, the practice of taking contingent fees was frowned upon and placed the offender in a lower and more dishonorable strata of practitioners. Gradually, however, the justice and necessity of such contracts in certain instances have been generally recognized, although courts and laymen seem to still view them with suspicion.[2]

[1] "Sometimes bar associations prescribe rules with respect to the compensation to be charged by their members for certain kinds of service and the conditions under which such service shall be rendered. * * * As between the members of the association the rules would be binding, as they would also be with respect to others who assent to them, but, in the absence of such assent, the right to recover for services must be determined and the amount of such recovery ascertained by the general law and not by the rules of the bar." Warvelle's Essays in Legal Ethics, p. 87, citing Boylan v. Holt, 45 Miss. 277.

[2] "It is contended that if a person could not secure counsel by a promise of large fees in case of success, to be derived from the suject-matter of the suit, it would often place the poor in such a condition as to amount to a practical denial of justice. It not infrequently happens that persons are injured through the negligence or willful misconduct of others, but who yet, by reason of poverty, are unable to employ counsel to assert their rights. In such event their only means of redress lies in gratuitous service, which is rarely given, or in their ability to find some one who will conduct the case for a contingent fee. That relations of this kind are often abused by speculative attorneys, or that suits of this character are turned into a sort of commercial traffic by the "personal injury" lawyer, does not destroy the beneficent idea last discussed. So it will be seen that much can be said in favor of contingent fees, viewed solely from an ethical standpoint." Warvelle's Essays in Legal Ethics, p. 92.

The contingent fee is purely a wild growth; it knows neither rules nor limitations. There is neither definiteness nor certainty about it. "If you lose, I get nothing; if you win, you get nothing," was the well-known definition of a certain lawyer who was asked by a client to explain to him the meaning of the word. While there is much exaggeration in this definition, it sufficiently expresses the idea that the attorney's compensation in this class of cases is not based on any consideration of the real value of the services of the attorney to his client, but is rather a joint speculation where one puts in his claim and the other his services with an agreement to share in the result at a certain ratio.

We have no intention at this time to enter into the question of the validity of agreements for contingent compensation nor to discuss the circumstances under which they may be said to become champertous. It is sufficient to say that the rule sustained by the great weight of American authority is to the effect that a contract between the attorney and his client for a contingent fee is not necessarily invalid. All the law will do in such case is to scrutinize the transaction, and see that it is fair, and that no unfair advantage has been taken either of the necessities or the ignorance of the client.[1]

But when will the law say that a contingent fee stipulated for is unconscionable? The general rule is that a contract by an attorney for the prosecution of a claim for a contingent fee is not void, unless it appear that the agreement was clearly extortionate, or

[1] Chester County v. Barber, 97 Pa. St. 455; Taylor v. Bemis, 110 U. S. 42, 3 Sup. Ct. Rep. 44; Perry v. Dicken, 105 Pa. St. 83, 51 Am. Rep. 181.

that the attorney has taken an undue advantage of his client.[1]

In the recent case of Herman v. Metropolitan Street Railway Company, however, the court attempts to make the rule more definite by setting a limit to the percentage which may be agreed upon. In the case referred to, which was decided by the United States Circuit Court (Second Circuit),[2] Judge Lacombe holds that an agreement to accept a contingent fee of fifty per cent is unconscionable in an ordinary accident case.

The authorities on this question are not very numerous. In the case of Rust v. Larne,[3] an attorney agreed to conduct a suit for the recovery of money and certain slaves, and in case of success to receive one-third of the amount recovered, or the value of the slaves. The court held that, the recovery having been at the time doubtful and only obtained after protracted litigation, the amount so agreed on was not so large as to be unconscionable. Another case holding one-third not to be an unconscionable percentage is *In re* Hynes,[4] where a guardian of certain infants employed counsel to recover real property of the latter of the value of $141,660, for a contingent fee of one-third. It appearing that the questions involved in the litigation were of great importance and difficulty, the court held the agreement a reasonable one. In only one case that has come to our attention, other than the recent one to which we have directed attention, has a contingent fee of fifty per cent been declared uncon-

[1] Taylor v. Bemis, 110 U. S. 42, 3 Sup. Ct. Rep. 441.

[2] 121 Fed. Rep. 184.

[3] 14 Ky. (4 Litt.) 411, 14 Am. Dec. 172.

[4] 105 N. Y. 560, 12 N. E. Rep. 60.

scionable.[1] The weight of authority, however, is to the effect that no hard and fast rule can be drawn in such cases, and that in many cases a contingent fee of fifty per cent would be perfectly reasonable.[2]

§ 202. **Compensation—When an Advocate May Contract for His Services on a Salary Basis.**—While at the present time there is no ethical objection to an advocate giving up his entire services for a stated salary, nevertheless it is a sharp departure from ancient ideals. The advocate originally could accept nothing but an "honorarium," and he must serve all parties alike, and in criminal cases was subject to assignment by the court to defend any indigent person charged with crime who might need the services of an advocate. Under such considerations it is difficult to conceive how an advocate could sell his entire time and services for a salary. And even at the present time many objections to such a compact are apparent. In the first place, there is the fundamental idea that advocacy is not an independent calling; indeed, the advocate, as an officer of the court, is subject to the latter's supervision and direction in many particulars, and where he sells his entire time and service to a third person he in some measure restricts his ability to comply with his obligations as such officer of the

[1] This was the case of *In re* Sloan (Pa. 1892), 14 Pa. Co. Ct. 359. In this case the court held that an agreement to pay an attorney a contingent fee of fifty per cent of a claim for collection will not be enforced where it appeared that the claim was not difficult of proof and might have been enforced after judgment, but that the attorney contented himself with obtaining judgment, which was collected twenty years later by counsel associated with him at the creditor's request.

[2] Cain v. Warford, 33 Md. 23; Reece v. Kyle, 49 Ohio St. 475, 31 N. E. Rep. 747, 16 L. R. A. 721.

court. In addition to that, a lawyer lowers the standard of professional dignity and brings it to the level of a mere clerkship.

We are not now speaking, of course, of those contracts in the shape of a retainer by corporations by which they may at any time command the services of the attorney during the life of the contract. By such a contract an attorney does not sell himself, nor all his time, to the corporation, but merely gives it a preference over other clients. In other words, they have the first call on their services, and the yearly retainer may or may not be in full compensation for his services.

Another feature of this question, concerns the propriety of an attorney contracting to give his services at a stated salary to a corporation or syndicate who then make use of such services at a profit to themselves. A contract of this character is clearly unethical and illegal. No unlicensed person can practice law, and any contract by which such person or corporation is enabled to make profit out of law suits by hiring an advocate at a stated salary to carry on matters of litigation, is not only contrary to the ethics of the profession, but is clearly illegal and void.[1]

§ 203. **Advertising—General Considerations.**—Hardly a single important meeting of a bar association can

[1] Jarvis v. Great Western R. W. Co., 8 C. P., cited in 15 Canada Law Journal, 276. In this case the corporation hired an attorney on a salary basis, but in various ways were able to use his services in the courts at a profit to themselves. The court said: "If what was suggested when the summons was originally moved, namely, that the defendants sought unlawfully to realize a profit out of the professional services of their attorney were true, I suppose the taxation of costs would be prevented; for it would, in principle, amount to allowing suits to be carried on in the name of an attorney for the profit of an uncertified person."

take place anywhere without some reference being made in the proceedings to the ethics of advertising and as to the extent to which a lawyer may go in soliciting business. The sentiment seems strong in the younger generation of commercial lawyers to pull away from the old ideals of the profession and to look upon the law more in the nature of a business. Some of the most radical of this class of lawyers have gone to the extent of calling the law a business, and claiming the right to resort to any and all methods made use of in ordinary trade and commerce. Such statements have had the unfortunate effect of leading some of the weaker members of the profession into practices which, though they might be tolerated in business, cannot be tolerated in an officer of the court. And herein lies the secret of the distinction between law and business. The law is not a business nor an independent profession, as that of medicine or dentistry; it is an adjunct to courts of justice. The lawyer is an officer and, as an officer, he owes his superior, the court, every consideration of respect. He can therefore indulge in no practice that would bring the court or the law into disrepute. If he does, he not only incurs the enmity of his own profession but also the severe displeasure of the court, who in exceptional cases will dismiss him as its officer and disbar him from the practice of his profession.

In the year 1903, Hon. Mitchell D. Follansbee, in an address before the Northwestern University School of Law, gave utterance to what we consider the soundest bit of advice as to the extent to which a lawyer may advertise we have ever had drawn to our attention. After a few generalities as to the ethics of advertising, Mr. Follansbee warns the lawyer to remem-

ber, always, that he is a member of the profession, and that because he is a member of the profession, certain things, which would be honorable enough for a tradesman to do in the way of advertising, must not be done by him. In the following ten sections we have used much of Mr. Follansbee's address, and desire thus publicly to give him credit for it. The author, however, has endeavored to follow out the ideas of Mr. Follansbee more minutely and endeavored to enter a little more in particular in regard to a subject which is of such great interest to lawyers, especially to those about to start in practice.

§ 204. **Advertising—Legal Directories and Newspaper Notoriety.**—The legal directory is the commonest form of legal advertising. The desire of members of the bar to increase their business has become so well known, that all over the country men in their vigils are planning new schemes and making new excuses for taking from the lawyer the price of a line or a card for an advertisement. There are over 400 of these legal directories published, and while few are of any value to the practitioner, they often succeed in making the publisher happy. This advertising in the legal directories is all a matter of the last forty or fifty years, and now one may safely say that there are few firms in the country whose names do not appear in one list or another. In the "English Law List," which is the official organ of the bar of that country, are to be seen the cards of Alexander & Green, Evarts, Choate & Beaman, Parsons, Shepard & Ogden, of New York, and several other well-known firms of the present day. In the "Scottish Law List" names of the same class appear. The same is true of the "Irish Law List." The Canadian firms advertise extensive-

ly. In Kine's International Law Directory, a London publication, are found cards of lawyers from Cape Town, Kimberley and Pietersmartisburg to Moscow. B. D. Milonopulu of Corfus, in Greece, advertises that he corresponds in English; Simeon Petases, Avocat, of Jerusalem, that his letters will be in Arabic; while Philip Morton, barrister at law of the Middle Temple, banished at Lahore, in the Punjamb District of India, calls attention to the fact of his proficiency in Persian and Urdu. The practice of the insertion of a card is so common, so world-wide, that it no longer attracts any adverse criticism. This sort of advertising has one advantage. It keeps a man's name before his friends in the profession, and when they have an item of business to send to his town, and take up the legal directory, or the banker's encyclopedia, or whatever list they use, they are apt to be reminded of some one they have known by seeing his name, and so send him business.

As a practical matter, it is doubtful whether newspaper notoriety is potent in building up a good clientage. It it were, there are a lot of men who would have reached affluence long ago; for many men in their time have seen their names in the head lines and their opinion referred to in editorial utterances, but their popularity and prestige seem to have been as ephemeral as the issue of the paper which exploited them, and their reputations have been made and lost before a single new client heard anything about them. That sort of publicity only impresses the man who does not know how those things are done, and that kind of a man seldom has any law business worth doing, and the man who really has law business that is worth doing, as a rule, does not care to pay to keep

his attorney in the calcium light of publicity. He recognizes that living in the public eye is not necessarily the most potent in real work.

§ 205. **Advertising—Divorce Advertising.**—Divorce advertising seems to be the most prevalent occasion for stumbling on the part of lawyers in soliciting business. Some states prohibit the solicitation of such business altogether, under penalty of fine. Where such statutes do not prevail it is probable that a simple card in a newspaper soliciting divorce business would not be any more reprehensible in the eye of the court than a solicitation of any other branch of legal practice, although in some respects it is more damaging to public morals, and is certainly a breach of professional ethics.[1] But in such advertisements misleading statements are made and false inducements hung out that bring both the courts and the law into bad repute, and affect injuriously the public welfare. Thus where an attorney publishes advertisements without any signature, representing that he can procure divorces for causes not known to the law, and without any publicity and without reference to the residence of the parties, and, by such advertisements, solicits

[1] Mr. Follansbee relates an interesting incident. He says: "While in Cleveland, alongside of a picture of a woman with her right arm raised toward heaven, almost touching the word 'free' in large letters, we find the following modest announcement: 'Divorces. Do not apply for a divorce until you have called on us, as we can save you the time, trouble and money. Consult us when in any trouble and it will cost you nothing, and our experience may be of inestimable value to you. The very best experienced legal talent. Divorce and accident or injury cases a specialty.' Of course, nowhere are advertisements such as I have quoted regarded as dignified or professional, and they are utterly useless. It is foolish to lose professional standing if there is no premium in it. It is too much like being a journeyman pirate with no share in the swag."

business of that character by communication through a particular postoffice box, by its number, such conduct is a libel on the courts and a disgrace to the attorney, and is calculated to bring reproach upon the profession, and the name of the offending party should be stricken from the roll.[1]

So, also, an advertisement reading: "Divorces legally obtained very quietly; good everywhere. Box 2344, Denver,"—is against good morals, is a false representation, and a libel on courts of justice, and repeated publications in a newspaper of such advertisement by an attorney constitutes malconduct in his office, for which the supreme court is empowered by statute to strike his name from the roll of attorneys.[2]

In the leading case of People v. McCabe, cited in the note, the court takes a very pronounced position: "The ethics of the profession," says the court, "forbid that an attorney should advertise his talents or his skill as a shopkeeper advertises his wares. An attorney may properly accept a retainer for the prosecution or defense of an action for divorce when convinced that his client has a good cause. But for anyone to invite or encourage such litigation is most reprehensible. The marriage relation is too sacred, it affects too deeply the happiness of the family; it concerns too intimately the welfare of society; it lies too near the foundation of all good government to be broken up or disturbed for slight or transient causes. * * * When a lawyer advertises that divorces can be legally obtained very quietly, and that such divorce will be good everywhere, such advertisement is a strong

[1] People v. Goodrich, 79 Ill. 148.

[2] People v. McCabe, 18 Colo. 186, 32 Pac. Rep. 28, 36 Am. St. Rep. 270.

inducement—a powerful temptation—to many persons to apply for divorces who would otherwise be deterred from taking such a step from a wholesome fear of public opinion. * * * Such an advertisement is against good morals public and private; it is a false representation and a libel upon courts of justice. Divorces cannot be legally obtained very quietly which shall be good everywhere. To say that divorces can be obtained very quietly is equivalent to saying that they can be obtained without publicity—a libel on the integrity of the judiciary."

§ 206. **Advertising—Politics as an Advertising Medium.**—There are two ways of going into politics: one as the active worker in a limited section of territory, such as a precinct, and there one may grow acquainted with a certain number of plain people, and if he is patient and a good fellow, and they like him, sooner or later those plain people, or their friends, will need, and must have, the advice and service of an attorney. The other method is to start in as an orator or spellbinder. The latter method sometimes leads the young lawyer to retainers in sensational suits, but there are so many spellbinders in the city or county, and so few sensational suits, that oratory is hardly an employment one can count on. When it comes to officeholding, the lawyer is usually disappointed, and if he does hold office, though his name is before the people, he does not advance especially in his profession. The offices are few and the aspirants many, and rewards, at best, are scant compared with the industry which is needed. The failure of the young lawyer who goes into politics to obtain the proper sort of advertising, is because of the fact that he finds himself advertised, not as a lawyer, but as a politician, or that he becomes

known as one who succeeds so little in law that he has time to devote to the duties of every right-minded citizen.

§ 207. **Advertising—Social Acquaintance and Club Life.**—Some men hope to become advertised through social connections; but only in the stories written by high-school girls is the young lawyer retained as he emerges from a conservatory or enters the box at the opera. The average business man would rather lend his legal friend one hundred dollars, without any clear hope of getting it back, than trust him with a ten-dollar lawsuit. He will do the first thing as a matter of friendship, but when he does the second it is a matter of business, and the business man's whole training has taught him that the men who do the best work are not the men who have much time for pleasures of the rich. Of course, there are exceptions. Sometimes, when a lawyer once gets a start and has an acquaintance, it is worth while to take a long trip in company with a wealthy client, with a wealthy man who may become a client; but this is a long shot, and always expensive.

About one lawyer a day plans to increase his acquaintance by joining a club or lodge, and therefore, whether he join for golf or billiards, or for fraternal insurance, he is sure to find the territory overcrowded and overworked, while the whole social fabric is honeycombed with members of the profession; and there, again, the men whose business is worth while, resent the insurance agent, and the dentist brings up unpleasant memories, but of a lawyer, most of all, they are cautious. If they get to know him well as a man, they respect him too highly to confess their financial embarrassments or marital infelicities, or moral delinquencies; and yet, they will bring those same

troubles to a lawyer whom they do not know, without reserve.

§ 208. **Advertising—Pretending to Be Learned or Whelmed with Business.**—It was the old idea that a man ought to look like a lawyer. Fifty years ago, young men copied the forehead of Mr. Webster. Later, especially in this western country, men failed to comb their hair because Matt Carpenter, of Wisconsin, did not. Boy orators come to the cities every year and think that eccentricities will be mistaken for originality of mind, and that a foghorn voice will be accepted as an indication of great force of thought. It is to be noticed that as they learn the practice of the upper courts they get over the eccentricities of dress and put a soft pedal on their utterances. Like them is the man who always carries the green bag on the streets, whether he has anything in it or not, because he has heard that Boston lawyers do that, and the man who always carries a law book on street cars or suburban trains, because he thinks it will give him a reputation as a student. There are other men who succeed quite well because through some aphasia they never talk on any but legal subjects, and that, irrespective of what any particular occasion may demand. They succeed pretty fairly well, as a rule, because they impress everyone with the fact that they are lawyers and up even with the times, and that mere fact helps them. Take a young man with no striking ability and let him constantly attend all manner of bar association and legal club meetings. Sooner or later there will get to be a suspicion among those who see him in such places that he must be a lawyer, and if they see him there long enough, they get an idea that he must be a pretty good lawyer, in the same way that we figure that any old settler must have something distinctive about him.

§ 209. **Advertising—Employment of Runners.**—Under statutes in force in some states, it will be an occasion for disbarring an attorney if he "lends his name to be used as attorney and counsellor by another person who is not an attorney and counselor." Such a statute, for instance, is in force in California. It has been held in that state that a contract by an attorney to pay a layman a third of his fee, if the layman procures the employment of the attorney by a litigant, is contrary to the public policy of that state as expressed by the statute we have quoted, as the effect of such a contract is to permit, by indirection, the use of another attorney's name by one not an attorney.[1] Since the practice denounced in this case is so often practiced, especially by attorneys making a specialty of negligence cases, it would not be a useless waste of space to call attention to some strong and unusual statements in the court's opinion in this case. Speaking of the attorneys' contract with one Bolte, a layman, by which the latter was to receive one-third of the fee of the former in any cases procured through his efforts, the court said: "Was not Bolte really allowed to use their names in the prosecution of a matter in litigation? Under the employment of them as attorneys, made through Bolte's procurement, they engaged to use their faculties as attorneys and counselors at law for his benefit, and that, too, in a cause in which he had no interest as a party. By the terms of the agreement he was to derive a benefit from the rendition of their services in their professional capacity, and to receive a share of their fee, as if he had been concerned with them as a regularly admitted at-

[1] Alpers v. Hunt, 86 Cal. 78, 24 Pac. Rep. 846, 21 Am. St. Rep. 17, 19 L. R. A. 483.

torney. He was thus enabled through their agency, vicariously, and not openly in his own name, to aid in the prosecution of a matter in litigation, and to receive through it such a reward as is usually gained by an attorney regularly admitted to exercise his profession. * * * If such a practice were allowed, an attorney might have a number of undisclosed associates through his agency exercising the functions of an attorney and counselor, and reaping the rewards flowing therefrom, without resting under any of the responsibilities incident to such position, and possessing none of the qualifications which the law demands and requires.'"[1]

[1] A certain class of lawyers who look upon their profession more as a business than a profession can see nothing wrong in a contract with a layman by which the latter engages to furnish him with causes of action and evidence to support them in consideration of a certain percentage of the attorney's fee. A recent case holds that such a contract is absolutely void and unenforceable. Langdon v. Conlin, 93 N. W. Rep. 388. In this case the Supreme Court of Nebraska held that a contract between an attorney at law and one who is not such an attorney, by which the latter agrees to procure the employment of the former by third persons for the prosecution of suits in courts of record, and also to assist in looking after and procuring witnesses whose testimony is to be used in the cases, in consideration of a share of the fees which the attorney shall receive for his services, is against public policy and void. In rendering its decision the court voiced the following sentiments: "It is apparent that it is the policy of the legislature to fix a high standard of professional ethics to govern the conduct of attorneys in their relations with clients and courts, and to protect litigants and courts of justice from the imposition of shysters, charlatans, and mountebanks. It seems to us that the contract in issue is but a thinly veiled subterfuge by which the plaintiff, who, it is conceded, was not a member of the bar, and who had never complied with any of the provisions of chapter seven, for the purpose of authorizing him to engage in the practice of law, undertook to break into the conduct of proceedings in a court of record, to which he was not a party, by attempting to form a limited and silent partnership with one who had complied with the provisions of the law and was

§ 210. **Advertising—"Buying Up" Causes of Action.**—In New York a lawyer can be disbarred for "buying up" legal business. Thus, a statute in that state provides that "no attorney shall buy any bond, bill, promissory note, book debt, or other thing in action, with the intent and for the purpose of bringing suit thereon." The courts have held that a violation of this statute is a ground for disbarment.[1] In other states, having no such statute, the "buying up" of business of this nature will not be ground for disbarring the attorney and is only questionable as to the extent such action might violate the rule of law in that particular state against champerty and maintenance. Thus, in Michigan it is a violation of no law for an attorney to purchase a chattel from one party and bring replevin against another to recover possession of it.[2]

In a very recent case, however, it has been held that champerty renders an attorney amenable to summary proceedings for disbarment, notwithstanding it may be effectual as a defense to the enforcement of a contract.[3]

§ 211. **Advertising—Stealing Another Attorney's Practice.**—It is also a good ground for the disbarment of an attorney that he endeavor to win business by stealing the patronage of a brother attorney. Nothing, perhaps, could be more reprehensible, at least in

entitled to the emoluments of the profession." The decision in this case is supported by the authorities: Alpers v. Hunt, 86 Cal. 78, 24 Pac. Rep. 846, 9 L. R. A. 483, 21 Am. St. Rep. 17; Burt v. Place, 6 Cow. (N. Y.) 431; Munday v. Whisenhunt, 90 N. C. 458; Lyon v. Hussey, 82 Hun, 15.

1 People v. Waldbridge, 6 Cow., (N. Y.) 517.

2 Town v. Tabor, 34 Mich. 262.

3 *In re* Evans, 22 Utah, 366, 62 Pac. Rep. 913.

the eyes of the profession, than such conduct. One attorney has no right to intermeddle with the clients of another attorney and endeavor to secure his own employment at the expense of the other. He may be disbarred for such practice. In the case of Baker v. State,[1] it was considered a proper cause for striking an attorney from the rolls that he intermeddled between a brother attorney and his client, grossly slandered the former and endeavored to induce the client to forsake the advice of her own counsl and follow his instead, offering to furnish advice without charge.

§ 212. **Advertising—Office Furniture and Modern Business Methods.**—There are lawyers who do not go out of their offices to advertise, and who smile at those who do. It is a trade maxim in a department store that the most important thing in selling goods is to get customers into the store, and it is figured that every customer who comes into the store will spend just about so much money, and likewise, these men argue that when a man comes into your office, it is only a question of time when he pays some of his money for your advice or efforts, and they claim that the money that is spent for this office advertising meets the best returns. In the papers and pleadings and letters that they send out they affect scrupulous care, and their recipient concludes that the writer is careful and painstaking, and methodical. The office and the work table are orderly, and this fact argues an orderly mind. The office stationery is rich but not gaudy, which is a sign of prosperity long continued, and generally one feels that the appearance of industry accompanies the fact.

[1] Baker v. State, 90 Ga. 153.

§ 213. **Advertising—The Final Test of Advertising Methods.**—The whole test of whether advertising is effective is whether the work of the advertiser is clumsy or artistic, is coarse or smooth. The man who does coarse work may win for a week or a year, but he will never know the heights of professional success; while the smooth man, who regards these questions delicately and works quietly and without friction, who dispenses with the steam calliope as an unnecessary adjunct, finds that each year his profession is more of a joy and his acts in the profession better appreciated.

There is something of a contrast between the people who are going to make things happen and who bring to the profession the tricks of the market place, and those who prefer to do business in a dignified way, a way that the great leaders of the bar have known, and which the so-called business lawyer can never understand and can never appreciate. And this significant fact remains, and the only fact of which we may be perfectly sure, that the man who does coarse work, and who is guilty of noisy advertising, whether in the country newspapers or in the cafe of the Waldorf-Astoria, will not win enduring success.

From time to time some trial reported in the newspaper attracts the attention of everyone, and the young practitioner is asked by the barber who serves him whether a certain man is not the best lawyer in town. The barbers and men in their station of life make up their minds easily and usually on insufficient information. They reflect the average opinion of that part of the public to which litigation and ownership are unknown delights, a public never profitable. The clients who really help are the men who are strong and steady. These men will not be deceived by ad-

vertising. They will be attracted to polite gentlemen of graceful address, engaging personality and habits of hard work, and little by little they will show their appreciation in practical ways. If the man whom they know is workmanlike, they will hear of that fact sooner or later; if he wins a difficult case, the news will get to them, even if the young man is guilty of spreading it; if he draws contracts and wills cleverly and smoothly and accurately, knowledge of that fact will also get about, until in time the lawyer will find that his clients are so many enthusiasts. They are so sure of his ability and his superiority that they are forever sounding his praises; so proud of his services, and the results those services have obtained, that each makes an especial effort to send new clients to the office, until the lawyer is beyond the need of any advertising with which he is concerned.[1]

[1] "Such a lawyer," says Mr. Follansbee, "finds himself sitting quietly and modestly while his name is mentioned at bank boards and around the firesides as one who, by inheritance and training, is honest, thoughtful and quiet, and by industry has become strong; and the monument of such a man will not be a few envelopes of press clippings, or packages of ballots never voted, or programs of Chautauqua assemblies, but it will be found in the reported decisions of cases in which he was victorious; in accurately drawing conveyances which have stood the test of years; and in the esteem in which he is held by families of quiet, God-fearing people, who have learned from him to place the help and friendship of the lawyer only slightly below that of the priest."

APPENDIX.

CANONS OF PROFESSIONAL ETHICS*

I

PREAMBLE

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

*[NOTE.—The following Canons of Professional Ethics were adopted by the American Bar Association at its thirty-first annual meeting at Seattle, Washington, on August 27, 1908.

The Canons were prepared by a committee composed of
Henry St. George Tucker, Virginia, Chairman.
Lucien Hugh Alexander, Pennsylvania, Secretary.
David J. Brewer, District of Columbia.
Frederick V. Brown, Minnesota.
J. M. Dickinson, Illinois.
Franklin Ferriss, Missouri.
William Wirt Howe, Louisiana.
Thomas H. Hubbard, New York.
James G. Jenkins, Wisconsin.
Thomas Goode Jones, Alabama.
Alton B. Parker, New York.
George R. Peck, Illinois.
Francis Lynde Stetson, New York.
Ezra R. Thayer, Massachusetts.]

II

THE CANONS OF ETHICS

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned:

1. **The duty of the Lawyer to the Courts.**—It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

2. **The Selection of Judges.**—It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of

their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

3. Attempts to Exert Personal Influence on the Court.—Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

4. When Counsel for an Indigent Prisoner.—A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5. The Defense or Prosecution of Those Accused of Crime.—It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

6. Adverse Influences and Conflicting Interests.—It is the duty of a lawyer at the time of retainer to disclose to

the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

7. Professional Colleagues and Conflicts of Opinion.—A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

8. Advising Upon the Merits of a Client's Cause.—A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

9. Negotiations With Opposite Party.—A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

10. Acquiring Interest in Litigation.—The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting.

11. Dealing With Trust Property.—Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent, should not be commingled with his private property or be used by him.

12. Fixing the Amount of the Fee.—In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable

requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. Contingent Fees.—Contingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges.

14. Suing a Client for a Fee.—Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

15. How Far a Lawyer May Go in Supporting a Client's Cause.—Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to

deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

16. Restraining Clients from Improprieties.—A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.

17. Ill-Feeling and Personalities Between Advocates.—Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities

between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. Treatment of Witnesses and Litigants.—A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19. Appearance of Lawyer as Witness for His Client.—When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.

20. Newspaper Discussion of Pending Litigation.—Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.

21. Punctuality and Expedition.—It is the duty of the lawyer not only to his client, but also to the Courts and

to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

22. Candor and Fairness.—The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence, which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. Attitude Toward Jury.—All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case;

and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

24. Right of Lawyer to Control the Incidents of the Trial.—As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

25. Taking Technical Advantage of Opposite Counsel; Agreements With Him.—A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

26. Professional Advocacy Other Than Before Courts.—A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.

27. Advertising, Direct or Indirect.—The most worthy and effective advertisement possible, even for a young law-

yer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

28. **Stirring up Litigation, Directly or Through Agents.**—It is unprofessional for a lawyer to volunteer advice to bring a law-suit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital *attachés* or other who may

succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

29. Upholding the Honor of the Profession.—Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed, owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law, but the administration of justice.

30. Justifiable and Unjustifiable Litigation.—The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harrass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

31. Responsibility for Litigation.—No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility

must decide what business he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32. The Lawyer's Duty in Its Last Analysis.—No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But, above all, a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

III

OATH OF ADMISSION

The general principles which should ever control the lawyer in the practice of his profession are clearly set

forth in the following Oath of Admission to the Bar, formulated upon that in use in the State of Washington, and which conforms in its main outlines to the "duties" of lawyers as defined by statutory enactments in that and many other States of the Union*—duties which they are sworn on admission to obey and for the wilful violation of which disbarment is provided:

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of.....

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or

*Alabama, California, Georgia, Idaho, Indiana, Iowa, Minnesota, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wisconsin. The oaths administered on admission to the Bar in all the other States require the observance of the highest moral principle in the practice of the profession, but the duties of the lawyer are not as specifically defined by law as in the States named.

witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD.

We commend this form of oath for adoption by the proper authorities in all States and Territories.

THE IDEALS OF THE AMERICAN ADVOCATE—A SYMPOSIUM.

BY HON. SIMEON E. BALDWIN.
Ex-Justice Supreme Court of Connecticut.

Every true man works toward an ideal. He imposes it upon himself. In the rough but impressive phrase of Emerson, he has hitched his wagon to a star.

To this responsibility of the individual there is added for every lawyer a responsibility that comes from without. He owes a special duty to his profession, and to the world because he is of that profession. *Noblesse oblige.* Nobility, under our institutions, does not belong to any individual. If some foreign sovereign decorates an American with a title, it confers no pre-eminence upon him here. But under our institutions that nobility of purpose and character which belongs to the legal profession in other countries belongs to it in equal measure in the United States. It is everywhere, as concerns its most conspicuous office—the advocacy of causes—a profession of strenuous and chivalric endeavor, and honored, as such, now, as much as in any former times or other lands.

It is the profession of those who contend for the rights of others. Altruism and personal sacrifice are its foundations. Let a lawyer plead his own cause, and he finds, as the proverb says, that he has a fool for his client.

The Romans put this strongly in their *Corpus Juris*: "Advocates who resolve the doubtful fates of causes and by the strength of their defense often set up again that which had fallen, and restore that which was weakened, whether in public or in private concerns, protect mankind not less than if they saved country and home by battle and by wounds. For in our warlike empire we confide not in those alone who contend with swords, shields and breastplates, but in advocates also; for those who manage others' causes fight as confident in the strength of glorious eloquence, they defend the hope and life and children of those in peril."*

This sentiment was the inspiration of Malesherbes, when he claimed the honor of defending the king, whose disregard of his counsels had cost him his crown and was to cost him his life. It was the inspiration of Denman, in supporting the rights of Queen Caroline; of Evarts, before the senate of the United States in resisting the impeachment of President Johnson.

*Code II, 7 de advocatis diversor um judiciorum, 14.

Great occasions like these come seldom, but the same qualities of advocacy are displayed and the same duties of advocacy discharged daily in every American state. Disregard of personal interest in fulfillment of professional obligations sacrifice of personal convenience to secure the interests of others; putting all the powers of mind and body, in one supreme effort of concentrated energy, at the service of clients; these are the common story of the contests of the bar.

The undue multiplication of lawyers in the United States, incident in part to our being a new country, and in part to our being a great and rich one, has had a necessary tendency to weaken the personal sense of what is due from him to his profession, on the part of each individual member of it. It was partly to counteract this tendency that the American Bar Association was organized in 1878. Its influence has been steadily good. It has not only consolidated the American Bar, but has helped to bring together that of every state, and to put before it a high standard of professional honor and excellence. It has had no new ideas to propose. It could have none. The ideals of the advocate have been unchanged since the first foundation, on a sure footing, of courts of justice. They are all bound up in the one thought of the honor of the profession. Honesty may do for the office lawyer. Something finer—honor—is the watchword of the court-house.

The advocate can achieve the ideals of his profession without eloquence. Simple, plain, straightforward statement is often better than eloquence. He can achieve them without any legal learning that could be called profound. A fair knowledge of law, with the power to make the most of what he knows, is generally enough. He cannot achieve them without a high sense of the rights of man, as man; without a sincere reverence for the institutions of human justice; without patient, self-forgetful, chivalric devotion to his client's cause.

BY HON. HENRY WADE ROGERS.

Dean of the Yale Law School.

You ask for an expression of my views on the "Ideals of the American Advocate." I know of no reason why an American advocate's ideals should be different from those of an English advocate, or of any lawyer in the active practice of his profession, whether he advises clients in his office or addresses courts and juries. In any and all cases he acts unworthily if he disregards the fact that he is a minister of justice, and cannot do, as a lawyer, anything which dishonors him as a Christian gentleman and a law-abiding member of society.

When one reflects upon the lawyer's ideals there comes instinctively to mind Lord Brougham's celebrated declaration concerning an advocate's duty to his client. "An advocate," he said in his famous defense of Queen Caroline, "in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences; though it should be his unhappy lot to involve his country in confusion." This is a most extraordinary and wholly indefensible and unworthy statement of a lawyer's duty. Brougham was undoubtedly a remarkable man who possessed great talents, enjoyed a wide fame and played a very conspicuous part in public affairs. He devoted himself to many things. He was not merely a lawyer, but was a man of letters, a man of science, a statesman and one who aspired to excel in all things and who directed his attention to many branches of human knowledge. He was not the ideal lawyer. The law was not congenial to him and in his early life he spoke of it as "the cursedest of all cursed professions," and referred to it as an "odious" profession. We do not look to such a man for our professional ideals. In his own day there were better and greater advocates at the bar, and on the bench more learned judges. We are told that he wanted that moral elevation which inspires confidence and respect, and which is essential to lasting fame. The statement I have quoted from him proves this estimate of him to be correct. If his declaration were to be accepted no honest man could enter the legal profession, or having entered it could remain in it.

We live, no doubt, in a commercial age. Its aspirations are for wealth, more than for renown or service. It is common observation that

> "The learned pate
> Ducks to the golden fool."

The bar may not have escaped entirely the insidious influence. No calling, not even the ministry, has been altogether untouched by it. Every profession has its mercenary side. But in no one of the learned professions is avarice the leading aim. In Robert Louis Stevenson's essay on "The Morality of the Profession of Letters" can be found this admirable statement: "The salary in any business under heaven is not the only, nor indeed the first question. That you should continue to exist is a matter for your

own consideration; but that your business should be first honest, and second useful, are points in which honor and morality are concerned." The ethics of the profession require that a member of the bar shall be first an honest man. He must live in rectitude and cherish his personal honor, not forgetting that personal honor is the distinguishing badge of the legal profession.

BY HON. U. M. ROSE.

Ex-President American Bar Association

It was a maxim of Cato the Censor that the orator "is a good man skilled in speaking." Quintilian, who is more emphatic, says: "Now, according to my definition, no man can be a complete orator unless he is a good man. I therefore require that he should be not only all-accomplished in eloquence, but possessed of every moral virtue."

As the art of public speaking is one that most lawyers must exercise, these sayings have often been applied to our profession. They may seem hard at first sight, since moral perfection is not attainable in our present state of existence. But it must be remembered that these distinguished men were speaking of the ideal orator; a model for aspiration, though too lofty for unimpaired realization. The complete orator and the perfect man are equally unknown; but one may be a good man though subject to many frailties, provided that these are not so grave or numerous as to stain his whole character. There are different degrees of virtue, but the habitual exercise of a few that are fundamental, such as are enjoined by legal ethics, tends to a gradual and general elevation of character. The central idea intended to be imparted by these two classical moralists is undoubtedly a true one.

These rules are not the work of Pharisaism, or the outcome of frivolous and over-refining casuistry; they are practical, well defined, profitable; and are based on long observation and experience. In so far as the lawyer fails to live up to them he will derogate from his own best interests, will bring reproach on himself and his profession, and will lay up provision for the day of regret and remorse. However great our apostasy may be, the standards, handed down from generation to generation, are still there; and if we can by any effort on our part render them more commanding and serviceable, the line of duty is too plain to admit of hesitation or dispute. They do not embrace the entire sphere of moral sentiments; but they do include the whole circumference of professional duties; erecting standards higher and more exacting than those which are commonly insisted upon; standards of courtesy, fairness, honesty, fidelity, truthfulness, good faith; and a quality of disinterest-

edness by no means common; in short, all of the attributes that go to make up the character of the true gentleman. The lawyer who lives up to these mandates stands on a proud eminence; his life, if he is not otherwise deficient, and if he is not made the victim of unrelenting and implabable fate, will be worth much in the world; while his influence will be a power in the land.

A good name is better than great riches, and words spoken by one who sets a praiseworthy and consistent example to his fellowmen will be golden; while those uttered by a man of profligate habits and evil life will be as chaff, like those of the Duke of Wharton, the most brilliant orator of his time, but unprincipled, and the slave of many vices, described by Pope, who knew him well, as possessing

"An angel tongue, which no man can dissuade."

Certainly the career of the lawyer is beset with difficulties, and is exposed to many temptations; but these are only multiplied and enhanced by evil practices.

Consistently with allotted space only one other point may be briefly mentioned. Fraternal feeling at the bar is something that soltens the asperity of controversy, tends to the better administration of justice and adds to the pleasures of life. It is neither so active nor so potent in our country as in others that might be named. The reasons are obvious, and are closely allied with the immense expanse of our territory, and the want of compactness of much of our population, the facility of admission to the bar which is often indulged, and the general looseness of discipline. The American lawyer is frequently overworked. In England, France and Italy the advocate is relieved of much drudgery by the collaboration of attorneys, a well trained body of assistants, leaving him more time for social duties, the amenities of life, and the widening of the field of endeavor. Other restrictions peculiar to our situation might be recited; but however serious the obstacles may be, it is nevertheless true that the lawyer owes an affectionate allegiance to his profession, which always demands a grateful remembrance; and that he should bring ungrudgingly his quota of influence to the work of elevating the tone of the bar, cheerfully lending his aid to secure the harmony of its members, and the promotion of its dignity, honor and usefulness.

BY HON. T. A. SHERWOOD.

Ex-Justice Missouri Supreme Court.

In the English and American Law, "advocate" is the same as "counsel," "counselor" or "barrister." Web. Dict.

In order to answer the requirements of the idea conveyed by the above title, premise may be assumed in the first place, that the per-

son to be discussed has, of course, a thorough knowledge of his profession, as well as of cognate sciences, for, as Sir Walter Scott so tersely observes, "a lawyer who knows neither literature nor history is a mere mechanic."

Secondly—He must be gifted with an imagination of undoubted vigor in order to be able to look over the contemplated forensic battlefield, see and anticipate what the adversary is likely to do, and thus put himself in his place. Judge Elliott in his General Practice very deservedly bestows the mead of great praise on the imaginative faculty, as being a necessity of legal success. And Beaconsfield asserted the imagination to be the most important factor in the science of human government.

Napoleon, too, as Bourienne relates, employed the mentioned faculty to great and successful advantage when, in the winter preceding his joining battle with the Austrian Melas, he used a map of Italy, on which with pins tipped with black and red sealing wax, he delineated the respective positions of the Austrian and French troops, and the location of the battle-field. Subsequent events showed a victory won by Napoleon, where, and in the manner and the position predicted.

Thirdly—He must have great power and force of expression; the faculty usually accompanies the imaginative faculty, because whatever a man vividly sees with mental vision, that also can he vividly describe. Of course the capability of speaking fluently and without embarrassment, is seldom attained except by *practice*, although Lord Clive, in his parliamentary speech, is an illustrious instance to the contrary. Charles James Fox, the ablest debator the world ever saw, became such, he declared, by boring with his forensic efforts, successive parliaments for years.

Fourthly—He should be logically as well as legally accurate. Such bifold accuracy is not at all inconsistent with splendor of imagery nor an appropriate flow of words. S. S. Prentiss of Mississippi, Rufus Choate of Massachusetts, are conspicuous examples of this assertion's correctness.

Fifthly—He should, regardless of public clamor or adverse criticism, do his duty as he conscientiously sees it. If he chooses to defend a man charged with crime, he will not be slack in his diligence nor in his vigilance because he *believes*, or even because he *knows* the accused is guilty. Every man, though guilty, is entitled to the same orderly method of procedure, the same scrupulous observance of all legal rights and forms, as if wholly innocent of the charge. Captain Kidd, placed on trial for piracy, is as safely guarded by the law, as would be the archangel Gabriel, when charged with a like offense.

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